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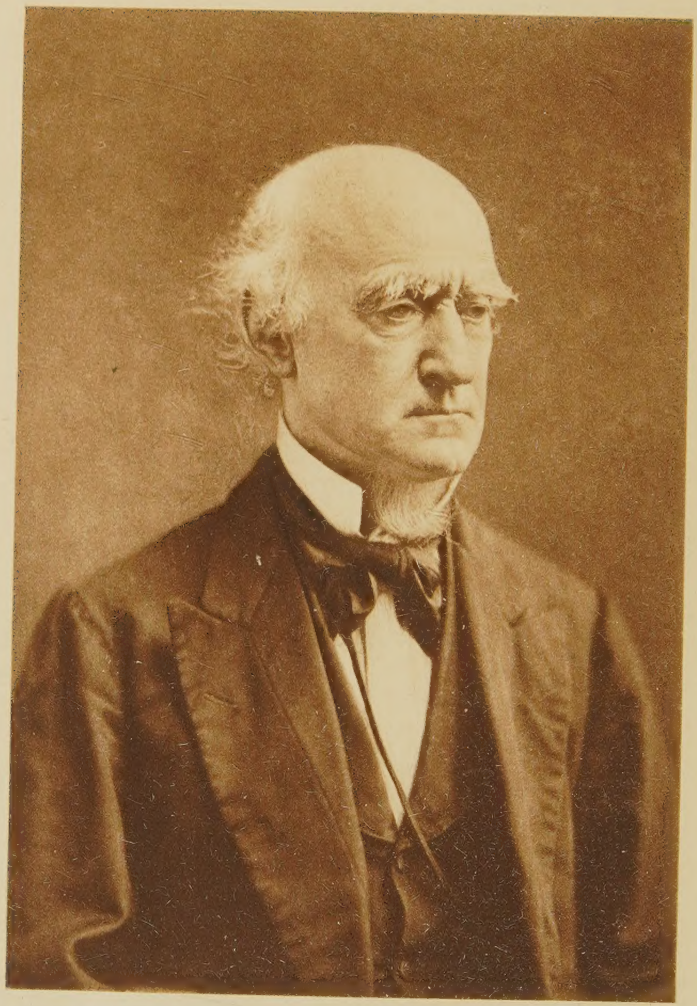

J. A. Campbell

JOHN ARCHIBALD CAMPBELL

ASSOCIATE JUSTICE OF THE UNITED STATES SUPREME COURT 1853–1861

BY

HENRY G. CONNOR, LL.D.

JUDGE OF THE UNITED STATES COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

BOSTON AND NEW YORK

HOUGHTON MIFFLIN COMPANY

THE RIVERSIDE PRESS CAMBRIDGE

1920

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TO

MY WIFE

KATE WHITFIELD CONNOR

PREFACE

In the preparation of the Annual Address delivered by me before the Alabama State Bar Association at its Session of 1917, at Birmingham, I became interested in the professional and judicial life and services of Judge John Archibald Campbell. I was impressed with his relation to, and the part which he took in, eventful cases and decisions as counsel and Judge in the Supreme Court of the United States, and his connection with several transactions of national importance preceding and during the Civil War. It seemed to me that, both for their historical value and for a clearer understanding of the conduct and motives of the participants, they called for a more careful and thorough investigation than had theretofore been given them.

Judge Campbell's career was, in many respects, unique and illustrated his remarkable capacity to render important service under unprecedented conditions. The generous manner in which the address was received, coupled with the approval of the surviving members of Judge Campbell's family, encouraged me to enter upon and complete the work which is submitted in this volume. I am indebted to the family for much of the material which I have used. For the account of those incidents in regard to which different versions have been given I have relied upon, and to a large extent given the exact

language used in, the original manuscripts made by him at the time of their occurrence. While, of necessity, the work is of special interest to lawyers, it is hoped that, by reason of the general character and larger scope of the questions involved in important causes which he argued, or took part in deciding, it will appeal to students of our judicial and political history.

I desire to express especial obligation to Captain Frederick M. Colston, of Baltimore, son-in-law of Judge Campbell, without whose constant assistance and generous interest the work could not have been executed. My thanks are also due for valuable suggestions to Mr. Carleton Hunt and Mr. William P. Dart, of the New Orleans Bar, and to Captain Samuel A. Ashe, of Raleigh, North Carolina.

H. G. Connor

Wilson, North Carolina
December 20, 1919

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JOHN ARCHIBALD CAMPBELL

CHAPTER I

ANCESTRY AND EARLY CAREER AT THE BAR

As early as 1729 several families of Scotch Highlanders had settled on the Cape Fear River in North Carolina. There they found a genial climate, a fertile soil, and a mild and liberal government. Everything contributed to their happiness and contentment. Their letters to friends and relatives in Scotland glowed with praise of their new home. Accordingly, when Neill McNeill, who had been one of the first Scotch settlers on the Cape Fear, returned from a visit to Scotland, in 1739, he brought with him three hundred and fifty Highlanders. The General Assembly, anxious to encourage further immigration of these sturdy settlers, exempted them from public and private taxes for ten years and offered the same inducement to any of their countrymen who might follow them.

Following this liberal offer came the disaster of Culloden, a general rise in rents in the Highlands, and the harsh enactments of the British Parliament, resulting in an immediate flow, strong and steady, of population from the Highlands to the New World. With a keen appreciation of its commercial advantages, the Highland immigrants selected a point of land at the head of navigation of the Cape

Fear, where they laid out a town, first called Campbellton, then Cross Creek, afterwards Fayetteville. The "Scots Magazine" and the "Courant" of that period, contain numerous accounts of the sailing of vessels, carrying a large number of Highlanders to North Carolina, from Islay, Skye, Sunderland, and other sections of the Highlands. Among other Highlanders who came to Campbellton were Allen McDonald and his wife Flora McDonald, both of whom returned to Scotland, after the battle of Moore's Creek Bridge.[1]

Though unfortunate economic conditions lay behind this emigration, it is not, therefore, to be supposed that those who left their native land to seek homes in America belonged to an improvident and thriftless class, or that they arrived in Carolina empty-handed. Such people are not the kind who voluntarily take upon their shoulders the task of conquering the wilderness and laying the foundations of new States. The Highland emigrants were among the most substantial and energetic people of Scotland; they left the land of their nativity because it did not offer them an outlet for their activities. The "Scots Magazine" refers to some of them as "the most wealthy and substantial people of Skye," and the "Courant" as the "finest set of fellows in the Highlands." By the year 1754 the Highland settlement around Campbellton had grown so important that the General Assembly erected it into a

[1] Wheeler, John H.: *History of North Carolina*, II, 126; Ashe, S.A.: *History of North Carolina*, I, 265–66; Sprunt, James: *Chronicles of the Cape Fear*, 124–27.

county, which, with curious irony, was called in honor of the Duke of Cumberland, and gave it the privilege of sending two representatives to the General Assembly.

As may be inferred from the name of their town, the Campbells were both numerous and prominent in the settlement. Among them was John Campbell, whose son, John Archibald Campbell, served during the Revolution as an officer in the American Army on the personal staff of General Nathanael Greene. Between the years 1779 and 1794 he represented New Hanover County in the State Senate nine terms and in the House of Commons three terms. He was a delegate in the Constitutional Conventions of 1788 and 1789 from New Hanover. In the Convention of 1788 he voted with the majority against the ratification of the Federal Constitution. He was also Judge of the Admiralty Court.[1]

Duncan Green Campbell, son of John A. Campbell, was born in North Carolina, February 17, 1787. He was graduated from the University of North Carolina in 1807. The following year he moved to Georgia, where he engaged in teaching, becoming president of a college for women. He studied law in the office of Judge Griffin, of Wilkes County, and was duly admitted to the bar. Soon after his admission he was elected Solicitor-General of the Western Circuit. Following his service in this office, he represented Wilkes County for four terms in the State Legislature. He was the author of, and introduced, the first bill in the history of Georgia having for its

[1] *State Records of North Carolina*, XVI, 90–95.

purpose the promotion of the education of women in the State. His speech advocating the measure attracted wide attention and gave an impetus to public sentiment on the subject. In the cause of public education he was an enthusiast and never omitted an opportunity for its promotion. He was industrious in his habits, liberal in his views, and always watchful of the public interests, especially of education and the diffusion of knowledge among the people. He was, for many years, a trustee of the University of Georgia.[1]

In 1824 Campbell was appointed, by President James Monroe, one of the commissioners to negotiate a treaty with the Creek Indians for the sale of their lands in Georgia and Alabama. The negotiations, with the complications growing out of them, became the subject of a long and bitter political controversy in Georgia. The question whether the course pursued by the commissioners should be approved, constituted the issue in the campaign of 1824, when the rival candidates for Governor were Governor George M. Troup and Campbell's brother-in-law, General John Clarke.

Clarke's supporters attacked the conduct of the commissioners and the treaty made by them. The controversy placed Campbell in a very embarrassing situation. Throughout the campaign, although he had more at stake in its issue than any man in the State, he took no active part in the angry strife, and while he continued the firm friend of General Clarke

[1] Sparks, Jared: *Library of American Biography;* Miller, S. F.: *Bench and Bar of Georgia,* 137.

he lifted no voice in opposition or disparagement of Governor Troup. "With Roman firmness he awaited the decision of the people. Conscious of the rectitude of his own conduct, he was fearless of consequences." [1]

Governor Troup was elected and the commissioners vindicated. The Legislature, by a unanimous vote, approved their action, while Congress also sustained the treaty.[2]

In 1828 Campbell was nominated for Governor. His election seemed assured, but he died July 30, 1828, before the day of the election. His memory is honored in the name of one of the counties of Georgia.

Duncan Green Campbell married Mary Williamson, youngest daughter of Micajah Williamson, Lieutenant-Colonel of the Georgia Regiment commanded by Colonel Elijah Clarke, which became famous in the annals of the War of the Revolution, in the Southern Department. It is said that her mother, Sarah Gilliam Williamson, grandmother of John Archibald Campbell, "was perhaps the most remarkable woman who lived in Georgia during the Revolutionary struggle. Considering her loyalty to the cause of the Colonies, her courage in managing a plantation, with a large number of negro slaves, during the absence of her husband at the front, her sufferings at the hands of the enemy, together with the success of her descendants, she stands ahead of

[1] Sparks: *Library of American Biography.*

[2] "Georgia and States' Rights," *Report, American Historical Association,* II (1901), 55, 56–59.

any of her Georgia sisters of that day. . . . Her five sons grew up to be successful men and her six daughters became beautiful, refined, and educated women, becoming the wives of distinguished men. One daughter married John Clarke, who became Governor of Georgia. To Sarah Williamson also belongs the distinguished honor of being the first American woman to furnish, from her descendants, two Justices of the Supreme Court of the United States. Justice John A. Campbell, of Alabama, was her grandson, and Justice L. Q. C. Lamar, of Georgia and Mississippi, was her great-grandson." Sparks, writing of the early settlers of middle Georgia, in the "Atlanta Constitution," says: "Those from North Carolina were mostly the descendants of Scotch-Irish; from them sprang Micajah Williamson, Elijah Clarke, John Clarke . . . the Abercrombies, Holts, and Duncan G. Campbell. These families and these men, all were remarkable for energy, talent, and enterprise, and, scattered through the counties of middle Georgia, gave tone and emphasis to the people and fashioned the future of the State. Many of these and their descendants have filled the first offices of the State and high places in the Government of the United States through the long period of their existence, without the imputation of dishonorable conduct ever having been imputed to them. Proud amongst these was Duncan Green Campbell." [1]

John Archibald Campbell, son of Duncan Green Campbell and his wife, Mary Williamson Campbell,

[1] *Atlanta Constitution*, January 10, 1910.

was born in Washington, Wilkes County, Georgia, June 24, 1811. At the age of eleven years he entered Franklin College, later the University of Georgia, from which he was graduated in 1825, with the first honors of his class. The following interesting incident of his college life is given by Governor Gilmer in "The Georgians": "While the son was a student of the college, his father visited Athens and was invited to attend a meeting of the Demosthenian Society, of which both father and son were members. Colonel Campbell held forth, by request, upon the topic of debate. When he was done speaking, John asked leave to answer the gentleman, and so knocked all his father's contentions into *non sequiturs* that it was difficult to tell which had the uppermost in the father's feelings, mortified vanity or gratified pride."

Upon his graduation, Campbell was appointed by the Secretary of War, John C. Calhoun, to a cadetship in the United States Military Academy at West Point. By reason of his father's death he resigned in 1828. He spent a year in Florida, teaching school to enable him to discharge the responsibilities imposed upon him by his father's death. Returning to Georgia, he studied law with Governor Clarke and his uncle, John W. Campbell. In 1829, at the age of eighteen, by virtue of a special act of the General Assembly, he was admitted to the bar, together with Robert Toombs. Determined to leave Georgia, Campbell went to Montgomery, Alabama, where, on March 9, 1830, he was admitted to the bar of that State. He continued to practice his profession

in Montgomery until 1837, when, desiring a larger field for his chosen life-work, he removed to the city of Mobile.

While residing in Montgomery, Campbell married Anna Esther Goldthwaite. A native of New Hampshire, she had accompanied her brothers, Henry and George Goldthwaite, to Alabama during the early years of the nineteenth century. The Goldthwaite family was established in Massachusetts as early as 1630. Mrs. Campbell's father and grandfather were both Colonial officers in New England, and, during the Revolution, remained loyal to the mother country. During the war they went to England, where her grandfather, Colonel Thomas Goldthwaite, received from the British Government compensation for his service and loyalty, and for the loss of his large estate in New England. He lived at Walthamstow, near London, where his father had also lived.

The brothers whom Anna Goldthwaite accompanied to Alabama became eminent members of the bar of Alabama and won high repute in the service of the State. Both Henry and George Goldthwaite were Justices of the Supreme Court, the latter being Chief Justice and, from 1870 to 1877, United States Senator.[1]

In an address before the Alabama State Bar Association, in 1884, Judge Campbell, referring to his early career in Alabama, said: "I continued to practice without relaxation or diversion in her courts; relations and habits, whether professional, domes-

[1] Appleton's *Cyclopædia of American Biography*, II, 673.

tic, or political, were formed in her society. Character, capacity, motives for exertion or for action, were developed and expanded there; and as one product and result, there is an abiding love for the State, for the law as a science and a profession, and an interest in her judicial institutions and in the members of her State Bar. . . . The courts were administered by men of learning and apt judgment; and their deeds and words were marked with the impress of moral and intellectual worth, and of personal honor. There were among the Bar great resources of energy, research, readiness, and manliness of effort which were habitually applied."

In 1836 Campbell was elected to the State Legislature. This was regarded, in those days, as an essential step in the preparation of a lawyer for a larger sphere of activity in his profession. In 1842 he represented the city of Mobile in the Legislature. "At this time he was generally regarded as a man of clear and vigorous intellect. In the Legislature he stood foremost among the leaders. On important occasions, his powers were exhibited with a cogency of argument which commanded a degree of attention which was accorded to but few members. In the Supreme Court, if not without a rival, he had no superior. His facts were stated in such a natural order and logical connection that the truth was illuminated and the judgment usually convinced." [1]

His personal appearance and manner, at this period of his life, are thus described by Mr. Miller: "He is cold, taciturn, not the least suggestion that

[1] Miller, S. F.: *Heads of Alabama Legislature.*

he courts society, absorbed in thought, with heavy brow, yet unassuming expression of countenance. At times he is pleasant, and always respectful when it becomes necessary for him to converse. . . . He seems to hold all elegance and imagination in utter contempt, as unworthy a practical man. As a member of the Democratic Party, he stands alone in Alabama for greatness of conception in all that relates to our political system." [1]

While Campbell's experience in the Legislature was unquestionably valuable to him in his career, his title to fame rests not upon his accomplishments as a lawmaker, but as an advocate and jurist. He used wisely the opportunity afforded him during these years, building upon strong and broad foundations the structure upon which judicial and professional fame, later in life, came to him.

When he moved to Mobile the titles to lands in Alabama were unsettled and complicated. The Spanish grants were obscure, the surveys not exact, and the growth of Mobile was rapidly increasing the value of lands in the town. He began the study of the French and civil law, purchasing the works of the standard authors. In his library were found the complete works of D'Auguessau, Merlin, Denisant, Cocklin, and others. As a student he was vigorously severe and industrious, prompted by a quenchless thirst for thorough and complete information.

During the first years of his practice he spent an hour each week-day in the study of Saunders's Pleading, reproducing the forms of declarations and

[1] *Bench and Bar of Georgia*, 137.

pleas and eliminating all unnecessary words. His ambition was not in the line of political preferment, but in professional learning.

In the Supreme Court of Alabama, and on the dockets of the Circuit Courts in which he practiced, is to be found the record of his labors. Evidence of the loyalty with which he paid court to the jealous mistress of which, as he says, "without relaxation or diversion" he was the suitor, is likewise found in his opinions, in the reports of the Supreme Court of the United States, and in his arguments before that tribunal, both before and subsequent to his elevation to the Bench and retirement. He argued, at the December Term, 1850, of the Supreme Court of the United States, Collins *vs.* Hallert.[1] At the December Term, 1851, he had six appearances, the most important, in point of the interests involved and the questions presented, being Gaines *vs.* Relf, Exr., and others.[2] He appeared in this case in the Circuit Court of the United States, where his argument elicited very high praise. It was published in full by the New Orleans papers. His analysis of the testimony, orderly arrangement, quotation and application of authorities, from writers on the civil law, and decided cases, American and English, sustain the encomiums pronounced by those who heard him.

One of the New Orleans dailies said: "A large assemblage filled the court-room, called as well by the deep interest felt in this very novel and extraordinary case, as by the fame of the gentleman appointed to speak. Their expectations were fully gratified.

[1] 10 Howard, 174. [2] 12 Howard, 472.

The argument of Colonel Campbell was one of the ablest efforts we have ever heard. It was terse, logical, learned, profound, and eloquent. All the important points in favor of Mrs. Gaines's claims were urged with an irresistible force of logic, a clearness of style, and a vigor of thought that seemed to carry conviction with all the listeners and greatly to startle the defendants, who have all along reposed very confidently on the strength of their case."

Following his argument the same paper said: "The name of this distinguished gentleman is heard on every side, and appears to be in the mouths of every one. His wondrous argument in the great Gaines case has all but immortalized him, so lucid, forcible, and convincing was it. . . . Mr. Campbell has reaped the field clean and garnered up for himself a rich harvest. . . . A merchant, whose business was pressing, who desired to be on 'Change at a certain hour, thought that he would drop into the United States Circuit Court for a moment — only a moment — to hear a few words of Campbell's argument and then form a hasty opinion of the gentleman. He did so — moments passed, hours, and still he moved not until the close. He has since declared that he became unknowingly interested in the case as the gentleman progressed, until so infatuated was he with his elucidatory style, brilliant and comprehensive pleading, that he could not tear himself away."

A stranger who was present wrote: "Among the arguments was one by a lawyer from Mobile, by the name of Campbell. He had made the most ample

preparation, and in the most ingenious way threaded the Cretan labyrinth of facts and testimony, holding on, as he went, to the clue of justice. Upon his reappearance from the mazes and windings of his argument, we could not help, though a stranger, tendering him our congratulations. They were received with all that modesty which will ever characterize talents."

This *cause célèbre* in American jurisprudence was argued before the Supreme Court of the United States by Reverdy Johnson and Campbell for Mrs. Gaines, and by Daniel Webster, Green, and Duncan for Relf and others.[1] The opinions of Justice Catron, writing for the majority against the claim of Mrs. Gaines, and of Justice Wayne for the dissenting minority, occupy forty-two pages of the volume. The latter concludes his opinion: "I think, then, that I run no risk in saying that there is nothing in the way of the law to be found interfering with the right of Myra Clark Gaines to the heirship of such portion of her father's estate as the law of Louisiana gives to an only legitimate child. . . . Those of us who have borne our part in the case will pass away. The case will live. Years hence, as well as now, the profession will look to it for what has been ruled upon its merits and also for the kind of testimony upon which these merits were decided. The majority of my brothers who give the judgment stand, as they may well do, upon their responsibility. I have placed myself alongside of them, humbly submitting to have any error into which I may have fallen, cor-

[1] 12 Howard, 427.

rected by our contemporaries and by our professional posterity. The case itself presents thought for our philosophy in its contemplation of all the business and domestic relations of life."

Judge Campbell's argument won much applause for its display of learning, legal acumen, and all the higher and more ambitious qualities of his profession. The language of Justice Wayne was prophetic. Ten years later the controversy in another form, involving, however, the same questions that were presented and argued on the first hearing, found its way to the Court in Gaines *vs.* Hennin.[1] Justice Wayne, writing for the majority, reversed the conclusion reached in the former appeal and sustained the contention of Mrs. Gaines. He concludes his opinion: "Thus, after a litigation of thirty years, has this Court adjudicated the principles applicable to her rights in her father's estate. They are now finally settled. When, hereafter, some distinguished American lawyer shall retire from his practice to write the history of his country's jurisprudence, this case will be registered by him as the most remarkable in the records of the courts."

But the end was not yet. The litigation went on in varying and variant forms. Seven years later, in Gaines *vs.* New Orleans,[2] Justice Davis, Justice Wayne having passed away, wrote for the Court, expressing the hope that the litigation would be closed by the decision then made. He said: "It has been pursued by the complainant with a vigor and energy hardly ever surpassed, in defiance of obstacles

[1] 24 Howard, 615. [2] 6 Wall. 642.

which would have deterred persons of ordinary mind and character, and has enlisted, on both sides, at different periods, the ablest talent of the American bar. . . . Courts, in the administration of justice, have rarely had to deal with a case of greater hardship or more interesting character. . . . Can we not indulge the hope that the rights of Myra Clark Gaines in the estate of her father will now be recognized?"

Although Mrs. Gaines had, in many of the numerous trials, won victories, she was required to establish on each hearing the determinative facts upon which her right to her father's estate depended. In the final opinion, the Court was required to reëxamine the testimony which Judge Campbell analyzed and discussed in 1851, and reached the final decision by the same processes of reasoning pursued by him before the Circuit Court in New Orleans. Judge Campbell's last appearance in the Gaines case is reported in New Orleans *vs.* Gaines, Admr.[1] It is a source of regret that, in response to the suggestion of Justice Wayne, "some distinguished American lawyer retired from practice," has not written a history of this most interesting case, which not only bristles with incidents illustrative of the controlling passions and philosophy of all the business and domestic relations of human life, but also presents principles of civil, ecclesiastical, common and statute law, both State and Federal, illuminated by citations from almost every source.

[1] 131 U.S. 191.

CHAPTER II

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES

CAMPBELL'S reputation as a lawyer had extended beyond the limits of the State. He held a high position in the estimation of the Justices of the Supreme Court of the United States, and it was inevitable that sooner or later he would be called into the judicial service of the State or Nation. In 1835, while he was serving a term in the General Assembly, he received from Governor Clement C. Clay the offer of an appointment to the Supreme Court of Alabama. This offer he felt it his duty to decline. Later a similar offer was made by Governor Henry W. Collier, which he declined. On January 19, 1852, Justice McKinley, of the Supreme Court of the United States, died. President Fillmore nominated to the vacancy George E. Badger, Senator from North Carolina. There was no question regarding Mr. Badger's learning, ability, and fitness for the position, but his attitude in the Senate on the slavery question during the sessions of 1850 and 1852 prevented his confirmation by the Senate. Accordingly, the vacancy had not been filled when Franklin Pierce was inaugurated President, March 4, 1853.[1]

[1] For an interesting account of Mr. Badger's nomination see *Papers of Thomas Ruffin*, II, 365, 382, 389. Mr. Venable, a member of Congress from North Carolina, says Mr. Badger's nomination failed because he did not live in the district from which Justice McKinley came, and for that cause alone.

Upon the request of the members of the Supreme Court of the United States, President Pierce nominated Campbell, who, on March 22, 1853, was unanimously confirmed to fill the vacancy. In a memorial address delivered before the Bar of the Supreme Court, October 13, 1874, Judge Campbell said: "The death of Judge McKinley made a vacancy and that vacancy was supplied by one recommended by the Justices — Judges Catron and Curtis bearing their letters of recommendation to the President." [1]

Mr. Carson, referring to the appointment, says: "He was a profound and philosophic jurist, who gave vigor and breadth to his intellect by constantly resorting to the great sources of the Roman law. From 1837 to 1853 the story of his life was the routine of an industrious, painstaking, earnest lawyer, exploring every domain of knowledge to make it tributary to his profession, overpowering his competitors at the bar by his great researches into the history of the law and his familiarity with principles and cases." [2]

The "New York Times," commending the appointment, said: "His professional learning is said to be vast and his industry very great. Outside his profession he is most liberally cultivated and, in this respect, ranks beside Story. . . . His mind is singularly analytical. Added to all, and crowning all, his perfect character is of the best stamp, modest, amiable, gentle, strictly temperate, and inflexibly just."

[1] 20 Wallace, ix.
[2] Carson, H. L.: *The Supreme Court of the United States*, 350.

The appointment met with the general approval of the public and the profession.

Mr. Badger, in the Senate (1854), advocating a bill increasing the compensation of the Justices, thus refers to Judge Curtis and Judge Campbell: "The two Juniors of the Court, from the extreme points of the Union, North and South, men of the highest character for learning, for integrity, for talent, for judicial propriety and decorum; men who have been placed upon the Bench with the prospect of having a long career of usefulness to their country and of honor for themselves, men led by a natural and honorable ambition, by a just professional pride, elevating them above sordid considerations, to accept a position, the compensation of which does not exceed the fourth of what their profession would have produced and would have continued for many years to have produced for them."

In his eulogy of Justice Curtis, pronounced before the Bar of the Supreme Court in 1875, Judge Campbell gives his estimate of the personnel of the Court at the time of his appointment. Referring to the manner in which Judge Curtis was called to the Bench, he said: "The appointment came to him. He was not required to pursue or to beseech it. It came to him by a divine right — as the fittest. The Court was presided over by Chief Justice Taney, who had established, to the acknowledgment of all, that his commission was held by the same title. He was then seventy-three years of age, bowed by years and infirmity of constitution. In the administration of the order and procedure of the Court, there was dignity,

firmness, stability, exactitude, and, with these, benignity, gentleness, grace, and right coming. The casual visitor acknowledged that it was the most majestic tribunal of the Union, and that the Chief Justice was the fittest to pronounce in it the oracles of justice. All of the Justices had passed the meridian of ordinary life before their Junior Associate had come to the Bar. There was much stateliness in their appearance, and, with diversities of character, education, discipline, attainments, and experience, all of them had passed through a career of honorable service, were men of large grasp of mind and honorable purpose. . . . Their deliberations were usually frank and candid. It was a rare incident . . . when the slightest disturbance, from irritation, excitement, passion, or impatience, occurred. There was habitual good-breeding, self-control, mutual deference, in Judge Curtis, invariably so. There was nothing of cabal, combination, or excitement, or exorbitant desire to carry questions or cases. Their aims were honorable, and all the arts employed to attain them were manly arts." [1]

Could there have come to a lawyer, who had devoted the early years of his life to the science of the law and pursued "without relaxation or diversion" the gladsome light of jurisprudence, a richer reward, bringing higher gratification of an honorable ambition, than the call to join this goodly company, to become a co-worker with them in administering justice in one of the highest judicial tribunals of the world? Richmond M. Pearson, afterwards Chief

[1] 20 Wall. ix.

Justice of North Carolina, who was, by hard work and unrelenting study, laying the foundations upon which he built his fame as one of the great common-law judges of the country, said when a young man that his ambition was to go upon the Supreme Court Bench and "rub up against Ruffin," who, without dissent, is conceded to have been North Carolina's greatest Chief Justice. We may well conceive that a similar vision came to Judge Campbell, when, for twenty years, he was imbuing his mind with the principles of the common law and mastering the writings of the jurists of the civil law. When Judge William Gaston, of North Carolina, was offered the United States Senatorship, he put it away from him, saying, "To administer justice in the last resort, to expound and apply the laws for the advancement of right and the suppression of wrong, is an ennobling and, indeed, a holy office, and the exercise of its functions, while it raises my mind above the mists of earth, above cares and passions, into a pure and serene atmosphere, always seems to impart fresh vigor to my understanding and a better temper to my whole soul." To a lawyer inspired with this noble ambition, wealth, political position, and power count nothing when compared with the opportunities for service which the judicial office brings.

Judge Campbell performed his full share of the work of the Court of which he had become a member. It is difficult for one who has not taken part in the deliberations and discussions of the conference room of a court of appeals to place a proper value on the personal and judicial, mental, and moral quali-

ties of each member of the Court, or to estimate his influence in aiding his associates in coming to a conclusion, moulding the form which the opinion takes, giving expression to the thought and mental processes by which the conclusion is sustained. The work of a judge, therefore, can best be understood and estimated by a careful study of his own and the opinions of his associates. It is impossible, except to a limited extent, to do more than refer to the most important opinions written by Judge Campbell. Reference to some of the most notable will enable us to estimate the quality of his judicial work, his method of labor, style of expression, the extent of his research and cogency of reasoning.

At the first term at which he sat, December, 1853, the case of The Executors of John McDonogh *vs.* Mary Murdock and others, heirs at law, was argued by Robert J. Brent, Henry May, and William H. Hunt, for the appellants, and by Reverdy Johnson and Judah P. Benjamin for the appellees. Judge Campbell, writing the opinion, expressed acknowledgment of the aid received from the able arguments at the bar and from the profound discussions in the Supreme Court of Louisiana. The case involved the validity of the holographic will of John McDonogh, who, domiciled in Louisiana, died without children, devising a valuable estate in trust for the establishment and maintenance of several public charities. He directed that his estate should be held by trustees in succession to effectuate his purposes, as declared in his will; that, after execution of several specific trusts, the balance of his estate

should be invested, and the income applied to the education of the poor children, without regard to caste or color, in the cities of New Orleans and Baltimore, "the whole of the general estate to form a fund, in real estate, which shall never be sold or alienated, but be held and forever remain sacred."

A number of difficult and interesting questions were presented and argued with elaborate preparation, distinguished ability, and a wealth of learning. The reporter states that the opinions of a number of eminent French jurists were taken and relied upon in the argument. Judge Campbell states clearly the objects and purposes of the testator, as set out in his will, saying: "The exaggeration which is apparent in the scheme he projects, and the ideas he expresses concerning it, afford the ground of the argument for the appellees. It is, however, unfair to look to the parts of the will which relate to the disorders which prevail in society, or to the aspirations of the testator to furnish relief for those 'during all time,' or to the prophetic visions awakened by the exalted and exciting ideas which dictated the conditions of the will, for the rule of its interpretation. We must look to the conveyances he has made in the instrument, the objects they are fitted to accomplish, and the agencies, if any, to be employed, and endeavor to frame these into a consistent and harmonious plan, accordant with his leading and controlling intentions."

Judge Campbell traces the sources and history of Roman jurisprudence, upon which that of Louisiana is founded, quoting from the codes and the writ-

ings of the great jurists of the civil law, for the purpose of interpreting the provisions of the Louisiana Code, prohibiting substitutions and *fidei commissa*, by which the trustee named could substitute another to take his place, thus continuing the trust indefinitely, saying: "The terms are of Roman origin and were applied to modes of donation by will, common during its empire, and from thence were transferred to the derivative system of law in use upon the Continent of Europe."

After an interesting history of the method resorted to for building up and continuing in families and corporations large estates and their accumulations, he says: "This mode of limiting estates from degree to degree, and generation to generation, was much employed on the Continent of Europe, and served to accumulate wealth in a few families, at the expense of the interests of the community. The vices of the system were freely exposed by the political writers of the last century, and a general antipathy excited against it. Substitutions having this object were prohibited during the Revolution in France, and that prohibition was continued in the Code Napoleon, whose authors have exposed, with masterly ability, the evils which accompanied them. The prohibition was transferred to the Code of Louisiana."

He reaches the conclusion that the prohibition does not extend to municipal corporations, or to trusts "for lawful and honorable purposes, or for public works, or for other objects of piety or benevolence." The opinion vindicated the wisdom of the

Justices of the Supreme Court in asking his appointment and the President in making it. It contains a mine of learning upon one of the most interesting and important questions in our chancery jurisprudence, derived from the civilians and the Statute of 43d Elizabeth, as applied to American conditions. It is a monument in the course of judicial decisions in this country, upholding and administering charities created and contributed to by men and women of wealth, large vision, and humane sympathies.[1]

At the same term a case was decided involving the title to valuable property and the interests of the members of the Methodist Episcopal Church. The litigation grew out of the division in the thought and conviction of the members of the Church residing in the Northern and Southern sections in regard to the institution of slavery. It was argued by Henry Stanbery, of Ohio, George E. Badger, of North Carolina, and Thomas Ewing, of Ohio. The cause of the separation was well understood, but was not referred to in the opinion of Justice Curtis, who wrote for a unanimous court, sustaining the contention of the Southern branch of the Church.[2]

It was also decided at that term that "Morse was the first and original inventor of the electro-magnetic telegraph for which a patent was issued to him in 1840 and reissued in 1848."[3] Salmon P. Chase was of counsel for the plaintiff, George Harding for the defendants. There was a difference of opinion among the Justices upon some of the claims.

[1] 15 Howard, 564. [2] Smith *vs.* Swormstedt, 15 Howard, 288.
[3] O'Reiley *vs.* Morse, 15 Howard, 62.

In Winans *vs.* Denmead, decided at the same term,[1] involving the alleged infringement of the patent issued to Ross Winans for the invention of the "drop bottom coal car," the general form of which is now in common use, the claim of Winans was sustained in an opinion by Judge Curtis. Judge Campbell, in a dissenting opinion, in which the Chief Justice and Judges Catron and Daniel concurred, said: "To escape the incessant and intense competition which exists in every department of industry, it is not strange that persons should seek the cover of the Patent Act for any happy effort of contrivance or misconstruction; nor that patents should be very frequently employed to obstruct invention, and to deter from legitimate operations of skill and industry. This danger was foreseen and provided for in the Patent Act. . . . Nothing in the administration of this law will be more mischievous, more productive of oppressive and costly litigation, of exorbitant and unjust pretensions and vexatious demands, more injurious to labor, than a relaxation of these wise and salutary requirements of the act of Congress."

In this opinion we find the first indication of Campbell's hostility to monopolies and the beginning of his long and ably maintained opposition to them in their manifold forms.

In an interesting history of the case of Burr *vs.* Duryee,[2] Albert H. Walker, in his sketch of George Harding, thus refers to the case of Winans *vs.* Denmead: "When that case was argued two young Jus-

[1] 15 Howard, 330. [2] 1 Wall. 531.

tices of great ability had lately come upon the Bench. These were Justices Curtis, of Massachusetts, and Campbell, of Alabama. Justice Curtis delivered the opinion of five Justices in terms which were construable as affirming the patentability of the operation of a mechanical apparatus. Justice Campbell delivered the opinion of four Justices vigorously controverting the opinion of Justice Curtis and the consequent conclusion of the Court. The development of the science of the patent law, which has occurred since 1853, has logically established the unsoundness of the opinion of the five Justices."

Mr. Harding wished to have the decision in Winans *vs.* Denmead, upon which complainant in Burr *vs.* Duryee relied, reversed. Three of the Justices who joined in the majority opinion in the first case were then on the Bench. He avoided any reference to the Denmead case, but furnished arguments fatal to its correctness. He so far succeeded that Justice Grier, who concurred in the decision of the first case, wrote the unanimous opinion in the last case, "and that opinion," though not formally overruling "Winans *vs.* Denmead, did speak of what is really the doctrine of that case in tones that it is difficult to distinguish from tones of contempt. . . . Justice Curtis and Justice Campbell measured their intellectual spears in Winans *vs.* Denmead. Voting with Curtis were Justices McLean, Wayne, Nelson, and Grier. Voting with Campbell were Chief Justice Taney and Justices Catron and Daniel. It was a division of the Court on Mason and Dixon's line, except that Justice Wayne of Georgia voted with the

four Northern Justices, instead of with his four Southern brethren. . . . On the issue which they debated in the Supreme Bench and which Curtis won there in Winans *vs.* Denmead, Campbell was right and Curtis was wrong. And because he was right, Campbell's dissenting opinion has now, after many years, been substantially embodied in the case law of the United States, while the opinion of Curtis remains only to be quoted by those who do not understand how obsolete it really is." [1] It is interesting to note that, although complainant in his brief relies on Winans *vs.* Denmead, defendant's counsel do not refer to it, nor is it cited or referred to in the opinion of Justice Grier.

In Marshall *vs.* Baltimore & Ohio Railroad Company,[2] Judge Campbell wrote a dissenting opinion vigorously combating the trend of the Court toward the enlargement of the jurisdiction of the Federal Courts in cases in which corporations were parties, upon the theory that they were citizens within the meaning of the Constitution and of the Judiciary Act. The debate was of long standing, and the evolution of the doctrine by which the jurisdiction has been sustained and enlarged is among the most interesting subjects in our judicial history. It began with the decision of Devaux's case,[3] in which Chief Justice Marshall said: "That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen and, consequently, cannot sue, or be sued, in the courts of

[1] *Great American Lawyers*, VIII, 64–70.
[2] 16 Howard, 314. [3] 5 Cranch, 61 (1809).

the United States, unless the rights of the members, in this respect, can be exercised in their proper name. If the corporation be considered as a mere faculty, and not as a company of individuals who, in the transactions of their joint concerns, may use a legal name, they must be excluded from the courts of the Union." In that case the jurisdiction of the Court was sustained upon the averment that the stockholders and directors of the Bank of the United States and the defendants were citizens of different States. In Louisville, C. & C. Railroad Company *vs.* Letson,[1] the Court, Taney being then Chief Justice, while disclaiming that it was overruling the Devaux case, announced the doctrine that upon the averment of the domicile of origin of the corporation the presumption arose that the stockholders were citizens of the same State.

In Marshall *vs.* Baltimore & Ohio Railroad Company, the jurisdiction was invoked upon the averment that "the Baltimore & Ohio Railroad Company is a body corporate, by an Act of the General Assembly of Maryland," the plaintiff being a citizen of Virginia. The corporation challenged the jurisdiction in that it was not alleged that any of its stockholders were citizens of Maryland. Mr. Justice Grier, writing for the majority, held that the form of the averment was sufficient; that the presumption arising from the habitat of a corporation in the place of its creation was conclusive as to the residence or citizenship of those who use the corporate name and exercise the faculties conferred by it, and that the

[1] 2 Howard, 497 (1844).

declaration contained a sufficient averment that the real defendants were citizens of that State.

Judge Campbell dissented in strong but temperate language. After reviewing the earlier cases and discussing Letson's case, citing the language of Chief Justice Marshall in the Devaux case, which he insisted was the only authoritative declaration of the Court, he says: "The word 'citizen' in the American Constitution, State and Federal, had a clear, distinct, and recognized meaning, understood by the common sense and interpreted accordingly by this Court through a series of adjudications. The Court has contradicted that interpretation, which will undermine every limitation in the Constitution, if universally adopted. A single instance of the kind awakens apprehension, for it is regarded as a link in a chain of repetitions. The litigation before this Court, during this term, suffices to disclose the complication, difficulty, and danger of the controversies that must arise, before these anomalous institutions shall have attained their legitimate place in the body politic. Their revenues and establishments mock at the frugal and stinted conditions of State administration; their pretensions and demands are sovereign, admitting, impatiently, interference by State legislative authority. . . . I am not willing to strengthen, or to enlarge, the connection between the courts of the United States and these litigants. I can consent to overturn none of the precedents or principles of this Court, to bring them within their control and influence. I consider that the maintenance of the Constitution, unimpaired and unal-

tered, a greater good than could possibly be effected by the extension of the jurisdiction of this Court to embrace any class either of persons or cases."

The jurisdiction of the Federal Court in cases in which corporations are parties has long since passed beyond the domain of debate. It must be conceded that in establishing such jurisdiction, the science of pleading and resort to a fiction has been liberally invoked. As matter of fact the conclusive presumption upon which the jurisdiction is based is in a large majority of cases untrue. The development of the doctrine is an interesting illustration of the definition of a "fiction," which, Sir Henry Maine says, "is an assumption which conceals the fact that a rule of law has undergone alteration, the letter remaining unchanged." [1] Or, as Bentham terms it, "An instrument of arbitrary power invented by functionaries, invested with limited powers for the purpose of breaking through the limits in which the power was intended to be circumscribed." [2]

Justice Harlan illustrates the practical working of the presumption indulged to sustain the jurisdiction: "The result will be that immediately prior to February, 1893, before the Pennsylvania corporation was organized, the stockholders of the Virginia corporation were presumably citizens of Virginia; that, a few days thereafter, in February, 1893, when they organized the Pennsylvania corporation, the same stockholders became presumably citizens of Pennsylvania; and that on the first day of March, 1893, . . . the same persons were presumably citi-

[1] *Ancient Law*, 25. [2] *Works*, IX, 59–77.

zens, at the same moment of time, of both Virginia and Pennsylvania." [1]

Fictions have always been prolific sources for the enlargement and amplification of jurisdiction, and will probably continue to be resorted to by courts for that purpose.[2] There is much truth in Governor Simeon Baldwin's observation in discussing this question. He says: "The ease with which this may be done, under such circumstances, is both a sign of the strength of the written constitution and the utility of the legal fiction. Written constitutions are strong, because, if need be, new meanings can be read into them and old meanings read out of them, in the quiet of a courtroom, by judicial authority. Legal fictions have been found of service because they make bridges between social epochs — useful while travel goes that way — easily burned or shifted to new positions when it may be forwarded to some new goal." [3]

In Dodge *vs.* Woolsey,[4] Judge Campbell again, in a dissenting opinion, expressed his hostility to the extension of the jurisdiction of the Federal Court, upon the appeal of corporations resisting State legislation. In that case the plaintiff, a stockholder in the Commercial Bank of Cleveland, Ohio, but a resident of another State, filed a bill in chancery in the Circuit Court of the United States against the

[1] Lehigh Mining and Manufacturing Company *vs.* Kelly, 160 U.S. 330.

[2] 3 Blackstone, Com. (Jones, 1553), note.

[3] "A Legal Fiction with its Wings Clipped," *American Law Review*, XLI, No. 38 (1907).

[4] 18 Howard, 331.

directors of the bank and the tax collector, for the purpose of enjoining the directors from paying, and the tax collector from enforcing, the collection of a tax imposed by the Legislature upon the bank. The contention was that, by its charter, the State had entered into a contract binding itself to a system of taxing the property of the bank. The defendant tax collector challenged the jurisdiction of the Court. The Court held that the provisions in the charter constituted a contract which prevented the Legislature from changing the method of taxing the property of the bank.

Judge Campbell wrote a dissenting opinion, in which Judges Daniel and Catron concurred. Denying the right of a stockholder of a corporation, without alleging collusion, fraud, or negligence on the part of the directors, to invoke the interference of a court of equity, respecting the management of the corporate property, Justice Campbell said: "The allowance of this plea interposes this Court between those corporations and the Government of the people of Ohio, to which they owe their existence and by whose laws they derive all their faculties. It will establish on the soil of every State a caste made up of combinations of men for the most part under the most favorable conditions of society, who will habitually look beyond the institutions and authorities of the State, to the central Government for the strength and support necessary to maintain them in the enjoyment of their special privileges and exemptions. The consequences will be a new element of alienation and discord between the different classes

of society, and the introduction of a fresh cause of disturbance in our distracted political and social system. In the end the doctrine of this decision may lead to a violent overturn of the whole system of corporate combinations. If this Court is to have an office, so transcendent as to decide finally the powers of the people over persons and things within the State, a much closer connection and a much more direct responsibility of its members to the people is a necessary condition for the safety of the popular rights. . . . The inquiry recurs, have the people of Ohio deposited with this tribunal the authority to overrule their own judgment upon the extent of their own powers over institutions created by their own Government and commorant within the State? The fundamental principle of the American Constitution, it seems to me, is that to the people of the several States belongs the resolution of all questions — whether of regulation, compact, or punitive justice — arising out of the action of their municipal government upon their citizens, or depending upon their constitutions and laws, and they are judges of the validity of all acts done by their municipal authorities in the exercise of their sovereign rights, in either case, without responsibility or control from any department of the Federal Government. This, I understand to be the import of the municipal sovereignty of the people within the State."

Discussing the suggestion that, in order to protect the corporation against popular prejudice, it was necessary that the jurisdiction be sustained, he says: "It may be that the people may abuse the powers

with which they are invested, and even, in correcting the abuses of their Government, may not, in every case, act with wisdom and circumspection. But, for my part, when I consider the justice, moderation, the restraints upon arbitrary power, the stability of social order, the security of personal rights, and the general harmony which existed in the country before the sovereignty of the people was a living and operative principle and governments were administered subject to the limitations, and with reference to the specific ends for which they were organized, and their members recognized their responsibility and dependence, I feel no anxiety nor apprehension in leaving to the people of Ohio a 'complete power' over their Government and all the instruments and establishments it has called into existence."

In Piqua Branch of the State Bank of Ohio *vs.* Knoop [1] was presented the much-debated question respecting the rule which should control in construing an act of the Legislature, changing the method of, or imposing upon corporations, taxation other than is prescribed in the charter, and the extent to which such provisions are contractual. The majority of the Justices sustained the contention of the bank. Judge Campbell, together with Judges Catron and Daniel, dissented, Daniel adopting the opinion of Judge Campbell. After tracing the history of the struggle in England for the preservation of the revenues with which the King was vested in trust for the people, Judge Campbell says: "The rule that

[1] 16 Howard, 376.

public grants convey nothing by implication, are construed strictly in favor of the sovereign, do not pass anything not described, that general words shall never be so construed as to deprive him of a greater amount of revenue than he intended to grant, was not the inventions of the craft of crown lawyers, but was established in contests with crown favorites and impressed upon the administration, executive and judicial, as checks for the people." Referring to "the sly and stealthy arts to which State Legislatures are exposed, and the greedy appetite of adventurers for monopolies, and immunities from the State right of government," he says: "We do not close our eyes to their insidious efforts to ignore the fundamental laws and institutions of the State and to subject the highest popular interests to their central boards of control, and directors' management. . . . The subject affects the public order and general administration. It is not properly a matter for bargain or barter, but their enactment is in the exercise of a sovereign power, comprehending within its scope every individual interest in the State."

The struggle so long maintained in the courts in respect to legislative grants of immunity from taxation of corporate property, based upon the principle announced in the Dartmouth College case, has, by the reservation in modern State Constitutions of the power to amend or repeal charters, to a large extent come to an end.

In Christ Church *vs.* Philadelphia,[1] Judge Campbell stated the rule, which has been uniformly ad-

[1] 65 U.S. 300, 24 Howard, 300.

hered to, by which grants of special privilege and exemptions from taxation should be construed, saying: "A statute exempting the property of a church from taxation is *privilegia favorabilis* and not contractual." To the argument, that the statute should be so construed as to make the exemption perpetual, he said: "Such an interpretation is not to be favored, as the power of taxation is necessary to the existence of the State and must be exercised according to the varying conditions of the Commonwealth."

In York and M. Line Railroad *vs.* Winans,[1] Judge Campbell wrote, for the unanimous Court, an opinion holding that a railroad company could not, by farming out its franchise or leasing its track, escape liability for the acts of its lessee. To the objection of the company that the cars employed were not built by and did not belong to it, but were the exclusive property of the lessee; that the agreement to divide profits did not constitute a partnership nor evince a relation of principal and agent, he says: "This conclusion implies that the duties imposed upon the plaintiff by the charter are fulfilled by the construction of the road, and that by alienating its right to use and its power of control and supervision, it may avoid further responsibility. But those acts involve an overturn of the relations which the charter has arranged between the corporation and the community. Important franchises were conferred upon the corporation to enable it to provide the facilities to communication and intercourse required for the public convenience. . . . The corpora-

[1] 17 Howard, 30.

tion cannot absolve itself from the performance of its obligations, without the consent of the Legislature." This doctrine has become the settled law of the country.

Judge Campbell found himself in opposition to the trend of thought and judicial progress extending the jurisdiction of the Court in admiralty causes. To understand correctly the conditions regarding that controversy with which he was confronted, a short historical sketch of the decisions made prior to 1852 is necessary.

Prior to the decision in Waring *vs.* Clarke,[1] the Supreme Court had held that the admiralty jurisdiction conferred upon the Federal Courts was confined to cases arising out of contracts made, or to be performed, or torts occurring on the sea or navigable water, within the ebb and flow of the tide. In The Thomas Jefferson,[2] Judge Story said: "This is the prescribed limit which it was not at liberty to transcend." In construing the grant of judicial power "to all cases of admiralty and maritime jurisdiction," it was held that reference must be had to the English statutes and decisions for the purpose of defining the terms used by the Convention of 1787. It was found that at the time of the adoption of the Constitution, the jurisdiction of the admiralty courts in England was confined to the sea and waters in which the tide ebbed and flowed, and that the jurisdiction was prohibited when the cause of action arose *infra corpus comitatus*. This state of the law was the result of a long and at times spirited contest

[1] 5 Howard, 451. [2] 10 Wheaton, 429 (1825).

between the common-law courts and the courts of admiralty. The question underwent an exhaustive examination, by Judge Story, presiding in the District Court in De Lovio *vs.* Boit.[1] This learned jurist, referring to the conclusion reached by him, says that jurisdiction was granted in "all maritime contracts whenever made, and all torts and injuries on the high seas or in ports within the ebb and flow of the tide." [2]

In his opinion in The Thomas Jefferson, Judge Story, foreseeing the difficulties which would be encountered by adhering to the limitations placed upon the jurisdiction under the English law, inquired whether, under the power to regulate commerce between the States, Congress might not "extend the remedy by the summary process of the admiralty to the case of voyages on the western waters." In Waring *vs.* Clarke[3] the Court held that the jurisdiction in admiralty extended to a collision on the Mississippi River within the ebb and flow of the tide, although *infra corpus comitatus*. This case was argued by John J. Crittenden, sustaining the jurisdiction, and Reverdy Johnson, *contra*. The question debated and decided by a divided Court was whether the jurisdiction extended to a case in which the collision occurred within navigable waters in which the tide ebbed and flowed and within the body of a county in a State, and this question, it was conceded, was "distinctly presented for the first time

[1] 2 Gall. (C.C.) 398 (1815).
[2] Story, W. W.: *Life and Letters of Joseph Story*, 266.
[3] 5 Howard, 451 (1846).

to the Court." Judge Wayne, writing for the majority, reviewed the English statutes and decisions, together with the Colonial records and the proceedings of the Convention of 1787, and reached the conclusion that "the grant of admiralty power to the Courts of the United States was not intended to be limited or to be interpreted by what were cases of admiralty jurisdiction in England when the Constitution was adopted," and that the limitation prohibiting the jurisdiction to collisions occurring *infra corpus comitatus* did not apply. To this conclusion Judge Catron gave his carefully guarded assent limited to the "precise case before the Court."

Judge Woodbury filed a dissenting opinion covering thirty-nine pages, in which Judges Daniel and Grier concurred. Emphasizing the line of cleavage between the members of the Court and the intensity of the conviction of the dissenting Justices, Judge Woodbury, after stating the case, says: "A great principle at the foundation of our political system applies strongly to the present case, and is, that while supporting all the powers clearly granted to the general Government, we ought to forbear interfering with what has been preserved to the States, and in cases of doubt to follow where that principle leads, unless prevented by the overruling authority of high judicial decisions." He carefully confined his opinion to the question of jurisdiction of admiralty in cases of tort, and distinguished this case from that decided by Judge Story in De Lovio *vs.* Boit, in which a contract constituted the subject-matter of the suit. He says: "In trespass it was always a test,

not only that it happened on the sea, instead of merely tidewater, but out of the body of a county." [1] Thus was inaugurated in the Federal Courts the controversy which, in other forms, but involving the same divergence of thought, had been waged in England, since 1361, between the courts proceeding according to the course of the common law and those in which the summary proceedings in the courts of the Lord High Admiral and his deputies prevailed.[2]

By the Act of 1845, Congress extended the jurisdiction of the District Courts in admiralty to matters of contract and tort arising in, or upon, the lakes and navigable waters connecting the same. The validity of this statute was challenged in The Genesee Chief.[3] Chief Justice Taney, writing for the majority of the Court, sustained the statute, not, as was argued it should have been, as within the power vested in Congress to regulate commerce, but as being within the terms of the grant to the judicial power to cases arising in admiralty and maritime jurisdiction. The act gave to either party the right to demand a trial by jury. There can be no doubt respecting the scope, extent, and ground upon which the decision is based. The Thomas Jefferson and cases following it were overruled. Judge Daniel dissented. That the decision was not based upon the statutory jurisdiction, but upon the constitutional

[1] Carson, H. L.: "Great Dissenting Opinions," *Report, American Bar Association* (1894), 284.

[2] Select Essays, *Anglo-American Legal History*, II, 312; Van Santvoord, G. W.: *Sketches of the Lives, Times, and Judicial Services of the Chief Justices of the United States*, 604.

[3] 12 Howard, 443 (1851).

grant, is made clear by the decision in Fretz *vs.* Bull,[1] rendered at the same term, wherein a collision occurred on the Mississippi River, at a place where the tide did not ebb and flow. Judge Wayne says that the decision in The Genesee Chief extended the jurisdiction to cases occurring on the lakes and navigable rivers of the United States.

In Jackson *vs.* Magnolia,[2] it was held, by a divided Court, that a collision of two boats in navigable water, on the Alabama River two hundred miles above tidewater, and in a county, was within the jurisdiction of the Admiralty Court. Justice Grier referred to the denial of the jurisdiction as "only a renewal of the old contest between courts of common law and courts of admiralty as to their jurisdiction within the body of a county," as "finally adjudicated and the argument exhausted." To the suggestion that the jurisdiction in The Genesee Chief was based upon the statute, he said it was never so held. To the argument founded upon the English law defining the admiralty jurisdiction and defending the departure made by the American courts, rejecting the ebb and flow as the test of the limits of the jurisdiction, Justice McLean, concurring, said: "Antiquity has its charms, as it is rarely found in the common walks of professional life, but it may be doubted whether wisdom is not more frequently found in experience and the gradual progress of human affairs; this is especially the case in all systems of jurisprudence which are matured by the progress of human knowledge. Whether it be com-

[1] 12 Howard, 466.

[2] 20 Howard, 296 (1857).

mon, chancery, or admiralty law, we should be more instructed by studying its present adaptation to human concerns than to trace it to its beginnings. Every one is more interested and delighted to look upon the majestic and flowing river than by following its current upward, until it becomes lost in its mountain rivulets."

These views did not receive the assent of the more conservative minds of Justices Daniel, Catron, and Campbell.

In his dissenting opinion, Judge Campbell calls attention to the fact that the collision occurred in Wilcox County, in the State of Alabama, between two steamboats navigating the Alabama River; that the river flows entirely within the State and discharges itself into the Mobile River and through that, and the Mobile Bay, connects itself with the Gulf of Mexico; that the collision occurred two hundred miles above the ebb and flow of the tide; that no port of entry had been established. He began the discussion by stating that, in his opinion, the Court assumed a jurisdiction over a case cognizable only at the common law and trial by a jury, and that the decisions contravened a large number of decisions of the Court based upon elaborate argument and mature decision which constituted a rule of decision to the Court. After quoting the provisions of the Constitution guaranteeing trial by jury in all actions at common law when the value in controversy exceeded twenty dollars, he said: "These, and other of like kind, identify the men of the Revolution as the descendants of ancestors who had maintained for

many centuries a persevering and magnanimous struggle for a constitutional government, in which the people should directly participate, and which should secure to their posterity the blessings of liberty. The supremacy of those courts of justice that acknowledged the right of the people to share in their administration and directed their administration according to the course of the common law, in all the material subjects of litigation — of that common law which sprung from the people themselves, and is legitimate by that highest of all sanctions, the consent of those who are submitted to it — of that common law which resulted from the habitual thoughts, usages, conduct, and legislation of a practical, brave, and self-relying race — was established in England and the United States only by their persevering and heroic exertions and sacrifices."

He proceeds to give an interesting history of the struggle, beginning in the reign of Richard II between the Commons and the great military officers who administered justice by virtue of their seigniorial powers — the Lords Constable and the Earl Marshal and the Lord High Admiral, quoting the Statute of 8th and 13th Richard II, which excluded from the realm the odious system of the Continent and declared, "that the Admiral should not meddle with anything done within the realm, but only with things done upon the sea." This act not accomplishing its purpose, another was enacted, declaring "that the Court of Admiralty hath no manner of cognizance, power, nor jurisdiction of any manner of contract, plea, or ground arising within the bod-

ies of the counties. . . . But that all manner of contracts, pleas, and grounds shall be tried, determined, discussed, and remedied by the laws of the land and not before nor by the Admiral or his Lieutenant, in no manner." By these and other statutes of like kind, the common law of the realm was placed upon an eminence and the Commons enabled to plead with authority against other encroachments and usurpations upon the general liberty. The struggle for the supremacy of courts proceeding according to the course of the common law with the Star Chamber and High Commission Court continued until the Revolution of 1640, when the latter were overthrown and trials secured in the ordinary courts of justice and by the ordinary course of the law.

Judge Campbell insisted that, in the midst of that contest, the settlements were formed in America, and the fruits of the struggle were incorporated into the Declaration of Independence and the Constitution; that the grant of jurisdiction to the Federal Courts of all cases "of admiralty and maritime jurisdiction" must be construed in the light of the admiralty jurisdiction as it existed in England. Following an interesting history of the discussions in the Colonial assemblies, the Convention of 1787, and the State Conventions, including the language used by Hamilton in the "Federalist," he says: "It did not enter into the imagination of any opponent of the Constitution to conceive that a jurisdiction which, for centuries, had been sternly repelled from the body of any county, could, by any authority, artifice, or device, assume a jurisdiction through the

whole extent of every lake and water-course within the limits of the United States." He refers to the opinion of Judge Story, in De Lovio vs. Boit, as "elaborated for its research, and remarkable, in my opinion, for its boldness in asserting novel conclusions and the facility with which authentic historical evidence that contradicted them is disposed of." After a critical discussion of the case, he says: "The error of the opinion in De Lovio vs. Boit on this subject, to my judgment, consists in its adoption of the harsh and acrimonious censures of discarded and discomfited civilians on the conduct of the great patriots of England, whose courage, sagacity, and patriotism secured the rights of her people, as an evidence of historical facts."

He concludes with the following spirited statement of his views: "The people of the several States have retained the popular element of the judicial administration of England and the attachment of her people to the institutions of local self-government. In Alabama the trial by jury is preserved inviolate, that being regarded as an essential principle of local self-government. In the Court of Admiralty the people have no place as jurors. A single Judge, deriving his appointment from an independent Government, administers in that Court a code which a Federal Judge has described as 'resting upon the general principles of maritime law, and that it is not competent to the States, by any local legislation, to enlarge or limit or narrow it.' If the principle of this decree is carried to its logical extent, all cases arising in the transportation of property or persons from

the towns and landing-places, whether in or out of the State, all cases of tort or damage arising in the navigation of the internal waters, whether involving the security of persons or title to property, . . . will be cognizable in the District Courts of the United States. If the dogma of Judges in regard to the system of laws to be administered prevails, then this whole class of cases may be drawn *ad aliud examen* and placed under the dominion of a foreign code *whether they arise among citizens or others*. The States are deprived of the power to mould their own laws in respect to persons and things within their own limits, and which are appropriately subject to their own sovereignty. The right of the people to self-government is thus abridged — abridged to the precise extent that a Judge appointed by another Government may impose a law, not sanctioned by the representatives or agents of the people, upon the citizens of the States. Thus the contest here assumes the same significance as in Great Britain, and in its last analysis involves the question of the right of the people to determine their own laws and legal institutions." He says that he has applied the law as settled in The Genesee Chief, which he distinguished from this case in deference to the principle of *stare decisis*, although a portion of the reasons assigned did not satisfy his judgment, but that he considers "that the present case carries the jurisdiction to an incalculable extent beyond any other and all others that have heretofore been pronounced."

It was inevitable, for the reasons stated by Chief Justice Taney in The Genesee Chief, that the limita-

tion placed by the earlier decisions on the jurisdiction of the Admiralty Court would be abandoned. Referring to these decisions he said: "It is evident that a definition that would, at this day, limit public rivers in this country to tidewater, is utterly inadmissible. We have thousands of miles of public navigable water, including lakes and rivers, in which there is no tide. And certainly there can be no reason for admiralty power over a public tidewater which does not apply with equal force to any other public water used for commercial purposes and foreign trade."

Construing the language of the Constitution, in accordance with the rule which requires the Court to look to the meaning of the terms used in the jurisprudence of England at the date of the Constitution or statute invoked by the Chief Justice in the Dred Scott case, the dissenting Judges had the best of the historical argument. The opinions are, however, interesting to the student as illustrative of the divergent canons of construction of our Constitution and the cast of mind of the Judges.

The last echo of the phase of the controversy in which Judge Campbell took part is found in the dissenting opinion of Chief Justice Taney in Taylor *vs.* Caryll.[1] The sole question presented and decided in that case was that where a vessel had been seized by the sheriff under a process of foreign attachment sued out of the State Court in an action for damages and a motion pending in that Court for an order of sale, a libel, filed in the District Court of the United

[1] 20 Howard, 583.

States for mariner's wages and process issued under it, could not divest the authorities of the State of their authority over the vessel; that the sale made by the sheriff conveyed a valid title against the purchaser at a sale made by the marshal. Justice Campbell wrote the opinion for a majority of the Court. No question was raised or discussed regarding the priority of the lien on the vessel for the mariner's wages. Chief Justice Taney wrote the dissenting opinion in which Justices Wayne, Grier, and Clifford concurred. He evidently thought that the last word in support of the decision in Jackson *vs.* Magnolia had not been said. After a well-sustained discussion of the question at issue in the case, he proceeds to a spirited defense of the jurisdiction of the admiralty. He opens the subject by saying: "I am sensible that, among the highest and most enlightened minds, which have been nurtured and trained in the studies of the common law, there is a jealousy of the admiralty jurisdiction, and that the principles of the common law are regarded as favorable to personal liberty and personal rights and those of the admiralty as tending in a contrary direction. And under the influence of this opinion, they are apt to consider any restriction upon the power of the latter as so much gained to the cause of free institutions." He notes that Sir Edward Coke had contributed to the creation of these opinions, and quotes the statement of Mr. Justice Buller, in Smart *vs.* Wolfe,[1] that the opinions of Coke on the subject had been received "with great caution and frequently contradicted."

[1] 3 T. R. 348.

Following an interesting history of the conflict in England, the Chief Justice concludes: "If we are to look to England for an example of enlightened policy in the Government, and a system of jurisprudence suited to the wants of a great commercial nation, or just and impartial laws by judicial tribunals upon principles most favorable to civil liberty, I should not look to the reigns of Richard II or Henry IV or Henry VIII for either. I should rather expect to find examples worthy of respect and commendation in the England of the present day, in her statute of 3d and 4th Victoria, in the elevated and enlightened character of its present courts of justice and their mutual respect and consideration for the acts and authority of each other, without any display of jealousy or suspicion."

This portion of the opinion is spirited, strong, and manifestly written as an answer to the dissenting opinion of Judge Campbell. In both opinions the authors were at their best. They are valuable contributions to the interesting history of the struggle between those who held opposing views respecting the construction of the grants of judicial power by the Federal Constitution.

Judge Campbell did not further resist the current of decisions which, during his term on the Bench, extended the admiralty jurisdiction. He concurred in the decision which enforced the limitation placed by Judge Taney in The Genesee Chief upon the jurisdiction to matters in contract and tort arising in business of commerce and navigation between ports and places in different States and Territories, upon

the lakes and navigable waters.[1] The suggestion, that the commerce clause limited the grant of judicial power in cases of admiralty and maritime jurisdiction, was denied in The Commerce; [2] and in an exhaustive discussion by Judge Bradley and Judge Clifford in The Lottawanna,[3] in which the decided cases were reviewed, it is said that in cases of tort the question of jurisdiction is wholly unaffected by the consideration that the ship was not engaged in foreign commerce or in commerce between the States; that the jurisdiction, whether the cause of action is contract or tort, does not depend upon the regulation of commerce.

With the death of Judge Daniel, the retirement of Judge Campbell, and the coming of Judges who accepted the later construction of the Constitution, opposition to the enlarged jurisdiction ceased, and it was extended without dissent. The result of the debate is well stated by Judge Bradley, referring to the duty of the Court to determine the true limits of the admiralty jurisdiction. He says: "This boundary is to be ascertained by a reasonable and just construction of the words used in the Constitution, taken in connection with the whole instrument and the purpose for which admiralty and maritime jurisdiction was granted to the Federal Government. Guided by these sound principles, this Court has felt itself at liberty to recognize the admiralty jurisdiction as extending to localities and subjects which, by the jealousy of the common law, were prohibited

[1] Allen *vs.* Newberry, 21 Howard, 244.
[2] 1 Black, 578. [3] 21 Wall. 558.

to it in England, but which fairly belong to it on every ground of reason when applied to the peculiar circumstances of this country, with its extended territories, its inland seas, and its navigable rivers, especially as the narrow restrictions of the English law had never prevailed on this side of the Atlantic, even in Colonial times." [1]

While, under the extended jurisdiction a vast number of cases involving maritime torts and contracts, arising on navigable rivers, find their way into the Admiralty Courts, the absorption of the jurisdiction of the State Courts in cases of this character, apprehended by Judge Campbell and those Judges who concurred with his opposition to the modern rule, has been largely limited by the development of the railroads over the country, in many sections absorbing the carrying of inland trade and commerce.

The case of Florida *vs.* Georgia [2] gave to Judge Campbell an opportunity to express his views regarding the jurisdiction of the Court upon which it was his fortune later on to exert a potent influence and add to his fame. Based upon the jurisdiction conferred by the Constitution in controversies between different States, a bill in equity was filed by the State of Florida against the State of Georgia for the purpose of having a controversy respecting the boundary between the two States adjudicated and

[1] 21 Wall. 576. For an interesting reference to the "lack of harmony among the Judges" in cases relating to the extension of the admiralty jurisdiction see H. L. Carson: "Great Dissenting Opinions," *Report, Am. Bar Asso.* (1894), 284.

[2] 17 Howard, 478.

settled. The Attorney-General of the United States, Caleb Cushing, asked permission to intervene and assert the claim of the United States to a portion of the territory in dispute. To the decision granting the prayer, Chief Justice Taney, Judge Daniel, Judge Curtis, and Judge Campbell dissented. The last two filed opinions, both insisting that, upon well-settled rules of equity practice, a person seeking to intervene in a case should be made a party and become bound by the decree. The Attorney-General disclaimed any purpose or power to make the United States a party to the cause. Counsel for both States objected to the intervention. Judge Campbell said: "I do not admit that the Attorney-General has any corporate or judicial character, or that he can be introduced into the record, as an actor or respondent in a suit. His duties are strictly professional duties, and his powers those of an attorney at law. Whatever he may do for the United States, a special attorney might be retained to do; nor can the United States appear in his name, or by his agency, in cases where they may not be a party."

Following an exhaustive discussion of the relation between the States and the United States in respect to the jurisdiction of the Federal Judiciary, he concluded with a spirited assertion of judicial independence of executive interference, saying: "Nor do I perceive that the Executive Department has any title to disturb the parties or the Court, with the expression of anxieties or apprehensions that the Court will be lured to perform what Congress alone may do, or that these constitutional conditions will

not be honorably fulfilled. The existence of this Federal Government, in its whole extent, is a testimonial to a magnanimous and disinterested polity of the States of the Union; nor is the concession which submits to a tribunal of justice between sovereign States the least weighty of the proofs of those dispositions. It seems to me that it is the duty of this Court to come to the exercise of the jurisdiction the States have conferred, in the same spirit; to exercise according to the letter of their submission, to exclude from it suspicions, jealousies, interventions from any authority, but to meet the parties to the controversy with confidence."

CHAPTER III

THE SLAVERY QUESTION BEFORE THE COURT

PROBABLY, in the judicial and political history of the United States, no decision of the Supreme Court has been so much discussed, so vigorously and bitterly attacked, as that rendered at the December Term, 1856, known and usually referred to as the "Dred Scott case." It appears on the records of the Court as Scott *vs.* Sanford,[1] and occupies two hundred and forty printed pages of the volume. The length of the opinions filed by the Justices is indicated by the fact that the pleadings and statements upon which the case was submitted and argued occupy but two pages, and the reporter regretted that, for "want of room," the briefs and arguments of counsel, at that time usually printed at length, "are omitted." It has been well said that the case "convulsed the whole country from one end to the other, and is still spoken of and discussed with heat, and frequently with a degree of ignorance as to the real points ruled in it equal to the warmth and feeling exhibited." [2]

It is not the purpose nor within the scope of this volume to discuss the merits or correctness of the opinions written by either the majority or the dissenting Judges. There is no phase of the case, as it was disposed of by the Supreme Court, in which those agreed whose feelings were enlisted. As sug-

[1] 19 Howard, 393.

[2] *Constitutional History as seen in American Law*, 179.

gested, the controversy has been as fierce in respect to what was decided as to the merits of the decision. One of the attorneys who argued the case insists that it is inaccurate to refer to the disposition of the case as a "decision." It was at the time, and is now, strongly insisted by those who differed from the views of the majority of the Judges that their opinions are nothing more than *obiter dicta*. The author of the "Memoir" of Chief Justice Taney devotes much space to his vindication from the "wild and willing imaginations of the party in whose path the decision was a stumbling-block." [1] The author of the biography of the Judge who wrote the principal dissenting opinion says that he writes "a full and circumstantial account of the case, because the action of the learned Judge has sometimes been misunderstood, and, as he expressed it in his last illness, a sense that some injustice has been done to him in connection with this case, which he expected those who were to come after him to repair." [2] Adopting the suggestion of Mr. George Ticknor Curtis, who used this language, that "the time has come when justice can be done to those who have passed away and when history can perform its appropriate office," and for no other reason, it is deemed proper to give a short history of the case and the opinion of Judge Campbell upon the questions argued before the Court, and which he thought called for discussion, together with his interpretation of the course pursued by the other Justices which has given rise

[1] Tyler, Samuel: *Memoir of Roger Brooke Taney*, 376.
[2] Curtis, G. T.: *A Memoir of Benjamin Robbins Curtis*, I, 195.

to much controversy and, probably, injustice to them.

Dred Scott, a negro, resident of the State of Missouri, and claiming to be a citizen thereof, brought an action in the Circuit Court of the United States for the District of Missouri against John F. A. Sanford, who claimed to be his owner, a citizen of the State of New York. In his declaration he alleged, in three separate counts, that the defendant had assaulted him, his wife, and his two daughters, for which he claimed damages. The defendant challenged the jurisdiction of the Court by a special plea in abatement, setting forth the facts from which he insisted the legal result followed that Scott was not a citizen of the State of Missouri. To this plea the plaintiff demurred, thereby admitting the facts set out in the plea. The Court sustained the demurrer and required the defendant to plead to the merits, which he did by filing the plea of "not guilty." The parties being thus at issue, they submitted the case to the decision of the Court upon an agreed state of facts. The facts which are material to an understanding of the points argued and decided are:

In the year 1834, Scott was a negro slave, the property of Dr. Emerson, a surgeon in the United States Army. During that year Dr. Emerson, in the discharge of his duty as an officer of the army, went to the military post at Rock Island in the State of Illinois, taking Scott with him. He remained there until May, 1836, when he removed, taking Scott with him, to Fort Snelling, situate on the west bank of the Mississippi River, in the territory known as

Upper Louisiana, acquired by the United States from France, north of latitude thirty-six degrees and thirty minutes north, and north of the State of Missouri. Dr. Emerson held Scott at Fort Snelling until 1838. In 1835 Harriet was the negro slave of Major Taliaferro, an officer of the army. In that year he took Harriet to Fort Snelling and held her there as a slave until 1836, when he sold her to Dr. Emerson, who held her in slavery at Fort Snelling until 1838. In 1836 Scott and Harriet, with the consent of Dr. Emerson, were married, and the two children named in the declaration were the issue of such marriage. Eliza was born on a boat north of Missouri. Lizzie was born in Missouri. In 1838 Dr. Emerson returned to Missouri, bringing Scott and his wife and child Eliza with him, where they continued to reside until the institution of the action. Before the commencement of the suit, Dr. Emerson sold and conveyed Scott and his wife and children to defendant, who had since the purchase held them in Missouri as his slaves. The assault was admitted to the extent necessary to present the question of law. It was also admitted that Scott, before the institution of this action, brought suit upon the same facts in the State Court and recovered judgment against defendant which, on appeal to the Supreme Court of the State, was reversed, and that case was then pending in the State Court.

The Court upon the agreed facts instructed the jury to return a verdict for the defendant, and from judgment rendered thereon a writ of error was sued out to the Supreme Court of the United States. The

case was twice argued. On the second argument Montgomery Blair and George T. Curtis represented Scott and Henry S. Geyer and Reverdy Johnson represented the defendant. After the first argument, differences of opinion were found to exist, and because of the importance of the questions involved a reargument was ordered. The Court prepared and directed argument upon two questions:

"1st, Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties; and

"2d, If it had jurisdiction, is the judgment it has given erroneous or not?"

The decision of the case depended upon the answer to these two questions. It is difficult, reading the record and the questions so clearly stated, to understand why the answer should have called forth opinions by the members of the Court, covering more than two hundred pages, and why the answer given by the majority of the Judges hastened, if it did not directly result in the attempted secession of eleven States from the Union, followed by civil war, lasting four years, resulting in the emancipation of every slave in the United States. Political parties of national scope were disrupted and new ones formed, as the result of this apparently simple controversy. It is manifest that the answer to the first question was dependent upon the answer to a primary question, whether a person of African descent was within the meaning of the term "citizen" as used in the Constitution and entitled to bring and maintain a suit in the Circuit Court of the United

States. The solution of this question did not necessarily involve the status as to slavery or freedom of Scott. If, because of his African descent, he was not a "citizen," the plea in abatement was valid without regard to his status, and the Circuit Court should have dismissed the action for want of jurisdiction, there being in that event no diversity of citizenship which was the essential basis of jurisdiction.

The Supreme Court, however, found itself confronted with a question of practice to be disposed of before proceeding to dispose of the question presented by the plea in abatement. It was insisted that, because the Circuit Court sustained the demurrer to the plea and required the defendant to plead to the merits, he could not rely upon the plea in abatement in the Supreme Court; that the plea was not, upon the record, before the Court. This question the Chief Justice disposed of, holding that the plea was before the Court. There would seem to be no reasonable doubt that the Court was compelled to examine and pass upon the question of jurisdiction. The validity of the plea involved the question whether Scott was a "citizen." This presented the inquiry whether, at the date of the adoption of the Constitution, a negro or person of African birth or descent was included in the word "citizen," as used by its framers. The principal discussion upon this question is found in the opinion of Chief Justice Taney and in the dissenting opinion of Justice Curtis. Both these Judges examined the question from the historical and other points of view, with thoroughness and ability. Each found much to sustain

his contention. Judge Curtis contended that the facts set out in the special plea did not exclude the conclusion that, notwithstanding Scott's African descent, he might, by manumission or otherwise, have been a freeman. He insisted that the historical evidence did not exclude Scott from citizenship because of his race. In support of this contention, he cited with approval a decision of the Supreme Court of North Carolina, in which it was held that a free negro was a "citizen" of that State.[1]

The majority having reached the conclusion that the Circuit Court was without jurisdiction, it was insisted by Judge Curtis that the case should be remanded to that Court, with directions to dismiss the action. This course would have disposed of the case without reference to other questions discussed in the argument. The Chief Justice, with whom Judge Wayne and Judge Daniel concurred, was of the opinion that, because of the language of the statute defining the jurisdiction of the Supreme Court, it was its duty, notwithstanding the opinion that the Circuit Court had no jurisdiction, to proceed to decide the questions going to the merits of the case as shown by the facts agreed upon. Judge Curtis discussed this question of practice with great clearness and sustained his view with abundant authority. It would seem that the weight of the argument upon this question was with the dissenting opinion.

From the opinion of the Chief Justice, that the merits of the case were before the Court and should be decided, the question arose whether the removal

[1] State *vs.* Manuel, 20 N.C. 601.

of Scott, by his owner, to Fort Snelling, under the circumstances set out in the record, worked his emancipation, and, if so, whether this status continued after his return to Missouri, where slavery was recognized and protected by law. If this question were decided against Scott, the case would have gone off upon a question of general jurisprudence, not involving the constitutional power of Congress to legislate in regard to slavery in the Territories. The Chief Justice takes but slight notice of this question, simply referring to the case of Strader *vs.* Graham,[1] as decisive of the contention, but Judge Campbell, to a large extent, bases his concurring opinion upon it.

After a concise statement of the facts, he says that his opinion is not affected by the plea in abatement and that he will not discuss the question it suggests. This is entirely logical in view of what he proceeds to say. If, as he concludes, Scott's status as a slave was not affected by his removal to Illinois and thereafter to Fort Snelling, the Circuit Court correctly instructed the jury, and the other questions were immaterial. He says:

"The claim of the plaintiff to freedom depends upon the effect to be given to his absence from Missouri in company with his master in Illinois and Minnesota, and this effect is to be ascertained by a reference to the laws of Missouri. For the trespass was committed upon one claiming to be a freeman and a citizen in that State, and who had been living for years under the dominion of its laws. And the

[1] 10 Howard, 82.

rule is that whatever is a justification where the thing is done, must be a justification in the forum where the case is tried.

"The Constitution of Missouri recognizes slavery as a legal condition, extends guaranties to the master of slaves, and invites immigrants to introduce them as property by a promise of protection. The laws of the State charge the master with the custody of the slave and provide for the maintenance and security of that relation. . . . The inquiry arises whether the manumission of the slave is effected by his removal, with the consent of the master, to a community where the law of slavery does not exist, in a case where neither the master nor slave discloses a purpose to remain permanently and when both parties have continued to maintain their existing relation. What is the law of Missouri in such cases? Similar inquiries have arisen in a great number of suits, and the discussions in the State Courts have relieved the question of much of its difficulty."

Following an exhaustive discussion and the citation of numerous authorities, English and Continental, Judge Campbell thus states his conclusion upon this branch of the case: "The question occurs as to the judgment to be given in this case. It appeared upon the trial that the plaintiff, in 1834, was in a state of slavery in Missouri, and he had been in Missouri for near fifteen years in that condition when this suit was brought. Nor does it appear that he, at any time, possessed another state or condition *de facto*. His claim to freedom depends upon his temporary elocation from the domicile of his origin,

in company with his master, to communities where the law of slavery did not prevail. My examination is confined to the case, as it was submitted, upon uncontested evidence, upon appropriate issues, to the jury, and upon the instructions given and refused by the Court upon that evidence."

He was of the opinion that, upon the record, it was not a controversy between citizens of different States and that plaintiff, at no period of his life which was submitted to the Court, has had capacity to maintain a suit in the Courts of the United States. Judge Campbell is careful to say that he concurs with the argument of the Chief Justice upon the plea in abatement, in so far as it has reference to plaintiff and his family, in any of the conditions or circumstances of their lives "*as presented in the evidence,*" thus carefully avoiding the academic question whether, if a freeman of African descent, Scott was a "citizen," that question not being before the Court. Some of the language used by Judge Taney in the discussion of this question gave rise to the harsh and unjust construction and criticism of his opinion. He was of the opinion that the judgment should be affirmed, or that it should be reversed and remanded, that the suit might be dismissed. Judge Campbell, in this aspect of the case, was in agreement with Judge Nelson, who wrote a strong opinion upon the effect of the removal of Scott, upon the agreed facts, to Illinois and Minnesota, citing Lord Stowell's opinion in *In re* Grace and Judge Story's comments upon it, in his letter to Lord Stowell.[1]

[1] Story, W. W.: *Life and Letters of Joseph Story*, I, 552.

Judge Curtis and Judge McLean dissented from this view, and both filed strongly reasoned opinions to sustain their contention. Up to this point it would seem that, without regard to differing opinions respecting the conclusions reached by the Justices, there is no just ground for criticizing the course pursued. There is very strong ground for the contention that if a majority of the Court reached the conclusion that, without regard to Scott's status, as a slave or freeman, he was not a "citizen," the mandate should have gone to the Circuit Court to dismiss the action. The same result followed the conclusion that, upon the facts agreed, he was a slave. It is said, however, that Judge Curtis was of the opinion that the Court had jurisdiction because he thought that Scott, upon the agreed facts, was entitled to his freedom. The majority of the Justices agreed that the decision should be confined to these questions. Judge Nelson was designated to write the opinion.

If the case had been disposed of upon Judge Nelson's opinion, it would probably have attracted but small public notice. While Judge Curtis dissented, passing the question of practice, the sole question decided would have been that, upon the facts agreed, whatever may have been Scott's status if he had remained at Fort Snelling, in Minnesota, upon his return to Missouri, and residence there with his owner, he was a slave at the time the alleged assault was committed. Lawyers would have honestly differed in respect to the correctness of this conclusion, and doubtless those who held views and whose feel-

ings were hostile to the institution, and who wished to see it placed under the strictest limitations, would have believed the decision wrong.

It must be kept in mind, for the purpose of understanding the course pursued in regard to other aspects of the case which caused the intense public excitement, that, while the controversy was a real one and the action brought in good faith, the parties were by no means the only ones interested. The course which the slavery agitation, in recent years, had taken in the country, the legislation of Congress in regard to the status of slavery and the rights of owners of slaves to carry them into the territory lying north of the line fixed by the Act of 1820, known as the "Missouri Compromise," and other legislation, had become the subject of political disturbance and sectional hostility. The debates in the United States Senate during the sessions of 1850–52, upon measures affecting this controversy, had enlisted the efforts of its ablest members. Attempts at compromise had failed. The rapid growth of population in the Territories, with their desire to be admitted as States, intensified the controversy. The power of Congress to prohibit slavery in the Territories was denied by the owners and advocates of the system and strongly sustained by those who saw in the admission of free States the ultimate destruction of the institution. The political campaign of 1856, resulting in the election of Mr. Buchanan, had been largely contested on this and other phases of the slavery question.

It was manifest that the country was being car-

ried by the agitation into dangerous currents and many conservative men thought that a decision of the Supreme Court, settling the question whether the congressional legislation excluding slavery from the northern portion of the Territories was valid, would be accepted as final. It was, under these conditions, an understanding of which is necessary, that the Dred Scott case found its way into the Court in 1854. Some of the counsel received no compensation for their services in arguing the case. All of them were of the highest professional position.[1]

While there was controversy respecting the manner in which the Court was brought to the conclusion that a discussion and decision of the constitutional questions argued by counsel should be made, it is sufficient to say that, upon the suggestion of Judge Wayne, the Chief Justice wrote the opinion as filed. Mr. George Ticknor Curtis gives an interesting account of the manner in which the course which the Court pursued was brought about.[2] Upon the publication of this work Judge Campbell wrote Mr. Curtis giving his recollection of the occurrence which, in some material respects, differed from Mr. Curtis's. Judge Campbell also gave his understanding of the matter in a letter published in the

[1] Tyler: *Memoir of Roger Brooke Taney*, 387; Curtis, G. T.: *Memorial Addresses — Justice Campbell*, delivered at a meeting of the Bar of the Supreme Court of the United States, April 6, 1889, and published in a pamphlet, 25. For an interesting view of the case see "The Dred Scott Decision," by E. S. Corwin, *American Historical Review* (1911–12), 52; Howe, D. W.: *Political History of Secession to the Beginning of the American Civil War*, chap. xv.

[2] *A Memoir of Benjamin R. Curtis*, II, 206.

"Memoir" of Chief Justice Taney, which was approved by Judge Nelson.[1]

It is not necessary, in any phase of the case in which Judge Campbell was concerned, to do more than refer to these sources of information. Whatever difference of understanding may have existed between those who were present and participated in the transaction, Mr. Curtis makes it clear that those with whom he was associated attributed no improper purpose to Judge Wayne. He says that he made the suggestion, which was adopted, "with the best intentions, with entirely patriotic motives; and believing thoroughly that such was the law on this constitutional question, he regarded it as eminently expedient that it should be so determined by the Court." [2]

It was conceded by all concerned that the constitutional question was fully and ably argued. Judge Campbell, in the letter to Mr. Curtis, says: "Judge Wayne stated that the case had been twice argued with thoroughness; that public expectation had been awakened and a decision of the important question looked for; that the Court would be condemned as failing in a performance of its duty, and that his own opinion was decided that the Chief Justice should prepare the opinion of the Court and discuss all of the questions in the cause. There was no debate about this. It seemed to be acquiesced in, though some did not approve it." He further says:

[1] Tyler: *Memoir of Roger Brooke Taney*, 382–85; 20 Wall. "Memoranda."

[2] *A Memoir of Benjamin R. Curtis*, II, 234.

"Each Judge was left free to express his own position and each one did define his position. There is an anomaly in the manner of the discussion in respect to the plea in abatement that has produced confusion and much misunderstanding. This was the discussion of the merits of the plea in abatement by some of the Justices."

That Judge Wayne and the other Justices who concurred with him were wrong in thinking that a decision of the constitutional question would be accepted by the losing side as final, and quiet agitation of the question of slavery in the Territories, was quickly demonstrated, and is not, in the light of what occurred, open to debate. Whether, if the decision had sustained the contention of those who maintained that the legislation was a valid exercise of congressional power, the expectation would have been realized, must remain an unanswered question.

In respect to the manner in which the Chief Justice and Justice Curtis maintained their respective views, we have the opinion of one of the counsel who took part in the argument, uttered after both these great Judges had passed away and the occasion of the litigation had ceased to have other than an historical interest. Mr. Reverdy Johnson, speaking at the meeting of the Bar in memory of Judge Curtis, lately deceased, said: "Able as was the opinion of the majority of the Court delivered by Chief Justice Taney, it was admitted at the time, I believe, by most of the profession, that the dissenting opinion of Judge Curtis was equally powerful. Lawyers may differ, as they have differed, as to which of these two

eminent men was right, but they will all concede that the views of each were maintained with extraordinary ability, while those who knew them both will never differ as to the sincerity of their respective convictions."

Judge Campbell, presiding over the memorial meeting, said: "In respect to the merits of the respective opinions, I have no design to say a word. They are marked with great ability and are an honor to the Court which was able to produce them. They will be considered hereafter as a link in the chain of historical events and justice will be done to all parties connected with them. I am not aware that there was any hostility or unkindness felt or expressed to Judge Curtis by those who did not concur with him. I can speak positively as to some and shall speak as to myself, our relations remained undisturbed by time, distance, and the corroding effects of sectional strife and civil war until the hour of his lamented death." [1]

Of this both these great Judges left unmistakable testimony. At the time of Chief Justice Taney's death (1864), Judge Curtis, seconding the resolutions adopted by the Bar of the First Circuit, meeting at Boston, referred to "his eminent abilities, profound learning, incorruptible integrity, and signal private virtues," and to the "great qualities of mind and character" exhibited in his "long and illustrious judicial career." [2] The value of this testimonial is to be estimated in view of the statement of his

[1] 20 Wall. "Memoranda."

[2] Curtis, G. T.: *A Memoir of Benjamin R. Curtis*, II, 336.

biographer that "Judge Curtis never spoke of any man, living or dead, otherwise than he felt." [1]

Following an able and interesting review of the Dred Scott case, Professor William E. Mikell concludes: "As a technical question of practice, the writer is of the opinion that Taney and his three associates erred in thinking the merits of the case before them, after deciding that the Circuit Court had no jurisdiction, just as he thinks Justice McLean, of the minority, was wrong in holding that the plea to the jurisdiction was not before the Court, but only the merits; but that the question was not then a settled one is apparent from a perusal of the opinions in this case and the authorities cited therein." [2]

The last word spoken by any of the participants in this famous case was by Mr. George Ticknor Curtis, at the meeting of the Bar of the Supreme Court upon the death of Judge Campbell, when, referring to the fact that he was the only survivor of those who took part in the argument and decision of the case, he said: "I know, perhaps, more of the internal history of that case than any other person who is now living. . . . It is due to the Southern Judges who sat in that memorable case to speak of their positions and the doctrines which they maintained." Referring to the claim made by the advocates of slavery, he said: "It was a plausible claim. It seemed to be founded in an equality of right as between the different sections of the Union regarded as slaveholding and non-slaveholding States. It is

[1] Curtis, G. T.: *A Memoir of Benjamin R. Curtis*, I, 231.
[2] *Great American Lawyers*, IV, 170.

not surprising, therefore, it never has been to me, that Judges of Southern birth and training, accustomed to this form of property which lay at the basis of social life in those States, should have overlooked those considerations that rendered the claim untenable under the Constitution. Certainly they were bound to follow their convictions, and, it seems to me, that no impartial person can now examine their opinions, as pronounced from the Bench, without seeing that they expressed convictions honestly and sincerely held, but it was supposed by those learned and upright men that, when the Supreme Court should have affirmed the constitutional doctrine, which they believed to be the true one, all further agitation and controversy would be ended. This was a great mistake and miscalculation as the sequel proved." [1]

Judge Campbell, when appointed to the Bench, emancipated his household slaves. He owned no others. While living in Washington he employed as his servants free colored persons. In compliance with the Alabama law he became guardian for his manumitted slaves and so continued during and after the Civil War. Judge Taney manumitted his slaves many years before his appointment as Chief Justice, supporting the older ones until they died.[2]

Whether the construction placed upon the consti-

[1] *Memorial Addresses — Justice Campbell*, 26; Tyler: *Memoir of Roger Brooke Taney*, 373; Van Santvoord: *Chief Justices*, 610; Potter, Clarkson N.: "Roger B. Taney," *Report, Am. Bar Asso.* (1881), 195; Christian, George L.: "Chief Justice Taney," *Report, Virginia State Bar Asso.* (1911), 180.

[2] Delaplaine, Edward S.: *Maryland Historical Magazine* (June, 1918), 131.

tutional provision, giving to Congress the power "to make all needful rules and regulations respecting the territory belonging to the United States," was correct, either in respect to slavery historically or upon other canons of construction, has long ceased to have other than historical interest.

The Dred Scott case does not stand alone in our judicial history as an illustration of diversity of opinion among the members of the Court and of uncertainty in respect to the questions decided. In Downes *vs.* Bidwell,[1] which is illustrative of this fact, the several Justices found as much difficulty in coming to an agreement respecting the relation of territory acquired by cession, or purchase, to the United States, and the extent to which the Constitution limited and controlled congressional power. The reporter encountered the same difficulty in formulating the "head notes" as in the Dred Scott case, saying: "There is no opinion in which a majority of the Court concurred." He adopts the same course in "making head notes of each of the concurring opinions."

As a protest against the decision in the Dred Scott case, the Supreme Court of Wisconsin rendered a decision which nullified the Fugitive Slave Law and denied the power of the Supreme Court of the United States to review the decision. The course pursued by the State Court raised an issue, the far-reaching effect of which exceeded the controversy regarding the legal status of slavery or the validity of the Fugitive Slave Law.

[1] 182 U.S. 244–391.

The record discloses the character of the controversy and the facts upon which it was based. Sherman Booth was arrested and brought before a United States Commissioner upon a warrant charging him with aiding and abetting the escape of a fugitive slave from the marshal in violation of the Act of Congress of September, 1850. Upon the hearing the Commissioner held Booth to bail, which was given. His bail surrendered him and he was committed to the custody of the marshal, whereupon he sued out a writ of *habeas corpus* before one of the Justices of the Supreme Court of the State. Upon the return to the writ, the marshal setting forth the cause of his detention, the Justice discharged Booth, and upon the return to a writ of *certiorari* issued by the Supreme Court of the State, the order of discharge was affirmed. The judgment was brought to the Supreme Court of the United States upon a writ of error. The record disclosed that in the State Court the validity of the Act of Congress was brought into question and the judgment of that Court was against its validity. Other questions were also presented and decided.

Thereafter Booth was indicted by the Grand Jury of the District Court for the same offense for which he was held to bail, and upon trial before a petit jury he was convicted, and sentenced to imprisonment one month and to pay a fine of one thousand dollars. He filed a petition in the State Supreme Court for a writ of *habeas corpus*, setting forth the proceedings in the District Court and alleging that the Act of Congress was unconstitutional. Other

objections to the proceedings in the District Court were presented. The State Supreme Court issued two writs of *habeas corpus* for Booth, then in the custody of the sheriff, to whose actual keeping he had been committed by the marshal, directing both officers to produce him before the Court, with the cause of his imprisonment. Upon the return to the writ, with a transcript of the proceedings of the District Court, the State Court adjudged that the imprisonment was illegal and directed his discharge. The Attorney-General of the United States presented to the Chief Justice a petition for a writ of error, which was allowed, and citation issued and served on the Clerk of the Supreme Court of the State. No return being made to the writ, upon the affidavit of the Attorney-General stating that he was informed that the Court had directed the Clerk to make no return to the writ of error and no order upon the journals or records of the Court concerning the same, an order was made directing the Clerk to make return to the writ. This order was disregarded, whereupon the Court permitted the Attorney-General to file a transcript of the record and docket the case, and directed that it stand for argument at the next term without further notice to either party. Both cases were argued at the December Term, 1858, by Jeremiah S. Black, Attorney-General, for the marshal. No counsel appeared for Booth or the State.

The Chief Justice, writing for the Court, which was unanimous, said that the propositions maintained by the State Court were new in the juris-

prudence of the United States, and their supremacy over the Courts of the United States, in cases arising under the Constitution and laws of the United States, asserted for the first time. After pointing out clearly the fallacy of the argument and the inevitable results of the attitude assumed by the State Court, he said that he had extended the examination of the decisions beyond the limits required by any difficulty in the questions; that the decisions having been made by the Supreme Judicial tribunals of the State, a Court so elevated in its position, which if it could be maintained would subvert the very foundations of the Government, it seemed to be the duty of the Court, when exercising its appellate powers, to show plainly the grave errors into which the State Court had fallen and the consequences to which they would inevitably lead.

The State Court asserted and exercised the power to nullify the judgment of the District Court, and also declared its opinion that the Federal statute was unconstitutional. This, in the opinion of the Supreme Court of the United States, rendered it proper to declare that, in its judgment, the statute, commonly called the Fugitive Slave Law, was in all its provisions fully authorized by the Constitution of the United States; that the Commissioner had lawful authority to issue the warrant and commit the defendant, and that his proceedings were regular and conformable to law; and that the jurisdiction to try and render judgment in the case was within the exclusive jurisdiction of the District Court.[1]

[1] Ableman *vs.* Booth, 21 Howard, 506.

While it was held, and in the United States Senate declared by Senator Sumner and others, that certain provisions of the Fugitive Slave Law of 1850 were unconstitutional, there could be no doubt that the question of its validity was for the decision of the Supreme Court, but, as said by Mr. George W. Biddle, "The voice of the law was no longer heard when the fires of war already appeared on the horizon." [1]

Twelve days after this decision was rendered, the Legislature of Wisconsin adopted a set of resolutions reciting the action of the Court and declaring that, in assuming jurisdiction of the case, the Supreme Court of the United States was guilty of an act of arbitrary power, unauthorized by the Constitution and virtually suspending the benefit of the writ of *habeas corpus*. "That the decision was an act of undelegated power, and therefore without authority, void, and of no force. It was further resolved that the Government formed by the Constitution of the United States was not made the exclusive or final judge of the extent of the powers delegated to it; but that, as in all other cases of compact among parties having no common judge, each has an equal right to judge for itself as well of infractions as the mode and measure of redress. That the principle contended for by the party which now ruled in the councils of the Nation, that the general Government is the exclusive judge of the powers delegated to it, stopped nothing short of despotism. . . . That the

[1] *History of the Development of American Constitutional Law*, 187; *Essays and Speeches of J. S. Black*, 417.

several States which formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infractions, and that positive defiance by these sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy." [1]

Another illustration of the intensity of the opposition in the Northern States to the Fugitive Slave Law, and of the determination to prevent its enforcement, is seen in the case of Kentucky *vs.* Denison, Governor of Ohio.[2] One Largo was indicted in the State Court of Kentucky for enticing a slave to leave her owner in violation of the statute of that State, and fled to Ohio. The Governor of Kentucky issued a requisition upon the Governor of Ohio, who, upon the advice of the Attorney-General of Ohio, that the charge against Largo did not constitute "crime" within the meaning of the provision of the Federal Constitution, refused to recognize the requisition or to deliver Largo to be removed to the State of Kentucky. The question, as stated by the Attorney-General of Ohio, was, "whether, under the Federal Constitution, the State is under an obligation to surrender its citizens or residents to any other State, on the charge that they have committed an offense not known to the laws of the former, nor affecting the public safety, nor regarded

[1] Tyler: *Memoir of Roger Brooke Taney*, 397. An interesting history of this case, with the course pursued by the Supreme Court and Legislature of Wisconsin is given in *Political History of Secession, to the Beginning of the American Civil War*, by Daniel Wait Howe, chap. xi.

[2] 24 Howard, 66.

as *malum in se* by the general judgment of civilized nations."

The State of Kentucky, through its Attorney-General, applied to the Supreme Court, in the exercise of its original jurisdiction, to issue a writ of *mandamus*, commanding the Governor of Ohio to obey the requisition. The motion was argued by Stevenson, Cooper, and Marshall, for Kentucky, and by Wolcott, Attorney-General of Ohio, for the Governor of that State. The reporter has set out very fully the arguments of counsel, and the authorities upon which they relied. It was conceded that the proceeding was without precedent. While the character of the writ of *mandamus*, in English and American jurisprudence, was discussed at length, the interest in the argument centers upon the controversy in regard to the construction of the word "crime," as used in the Constitution,[1] and the validity of the Act of 1793 regulating the procedure for enforcing the constitutional provision and imposing the duty upon the State to return fugitives from justice.

Attorney-General Wolcott insisted that the Act of 1793 was unconstitutional. He concludes his argument by serving notice that those whose views he represented did not propose to submit questions growing out of the action of the free States regarding slavery to the decision of the Federal Courts, saying: "The power to compose this national and political strife does not reside in this tribunal; the pursuing party cannot cross its threshold; the party

[1] Art. IV, Section 2.

pursued is beyond the reach of its arm; the subject of the difference has been excluded from its action; and the writ which it is solicited to grant has been denied to it for the exercise of its original jurisdiction."

The Court unanimously held that the position taken by the Governor of Ohio was without constitutional or statutory support, and that it was his duty to obey the requisition. The Chief Justice said: "But looking to the subject-matter of this law, and the relations which the United States, and the several States, bear to each other, the Court is of opinion, the words, 'it shall be the duty,' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created when Congress had provided the mode of carrying it into effect. . . . It would seem that when the Constitution was formed and when this law was passed, it was confidently believed that a sense of justice and of mutual interest would insure a faithful execution of this constitutional provision, by the Executive of every State, for every State had an equal interest in the execution of a compact absolutely essential to their peace and well-being in their internal concerns, as well as members of the Union. Hence, the use of the words ordinarily employed, when an undoubted obligation is required to be performed, 'it shall be his duty.' But if the Governor of Ohio refuses to discharge this duty, there is no power delegated to the general Government, either through the Judicial Department, or any other Department, to use any coercive means to compel him."

The decision was clearly right, but, as said by Mr. George W. Biddle, "There is a tone of almost pathetic dignity in the portion of the opinion in which it is asserted that the performance of the duty in question was left to depend upon the fidelity of the State Executive to the compact entered into by the other States." [1]

This was the last of the cases which came before the Court, prior to the Civil War, in which questions in regard to slavery were involved. The controversy had passed beyond the sphere of forensic debate and judicial decision.

Before closing this chapter of Judge Campbell's life, it will be of interest to note some incidents of a personal character relating to the Court and the attorneys practicing before it. But one change in the personnel came by resignation. Among the regrettable results following the decision of the ill-fated Dred Scott case was the resignation of Judge Benjamin R. Curtis. He assigned, as his reason for resigning, the meager salary which he received and the duty which he owed to his family; of course this was a sufficient reason. George Ticknor Curtis, however, says: "The pecuniary reason for resigning was the leading and decisive one . . . the other . . . although secondary and subordinate, had a material influence."

The correspondence between Judge Curtis and his brother, together with the discussion of the causes and incidents attending the resignation, is both interesting and illustrative of the high moral

[1] *History of the Development of American Constitutional Law*, 187.

qualities and elevated tone of mind and purity of heart of this learned, distinguished, and, in all respects, amiable judge and man.[1]

Upon learning of the resignation, Judge Campbell sent to Judge Curtis the following letter:

WASHINGTON CITY
September 3, 1857

DEAR SIR:

Your letter of the 1st inst. was received this morning. I deeply regret the decision you have made to resign your place on the bench of the Supreme Court. Had I been aware that such a measure was in contemplation, I should have placed before you an earnest remonstrance on the subject. There are public considerations which, in my judgment, render your resignation a misfortune to the country. I hope you will not consider it obtrusive or unbecoming in me to express to you my high appreciation of the very great abilities you brought to the performance of your duties, and my respect and veneration for the integrity with which those duties were habitually and consistently discharged on your part. It is a great satisfaction to me that our relations on the bench have uniformly been those of courtesy and kindness, and I trust that they may, from time to time be renewed, notwithstanding this official separation. Mrs. Campbell joins me in sincere regret for the decision you have made, and in the expression of esteem and respect for Mrs. Curtis and yourself.

Very truly yours

J. A. CAMPBELL

[1] Curtis, G. T.: *A Memoir of Benjamin R. Curtis*, I, 244.

Nathan Clifford, of Maine, was appointed to fill the vacancy caused by Judge Curtis's resignation.

Judge Daniel died December 4, 1860, and at the memorial meeting of the Supreme Court Bar, Jefferson Davis, then Senator from Mississippi, presided. Edwin M. Stanton made the motion for the appointment of the Committee on Resolutions which were presented to the Court by Attorney-General Jeremiah S. Black. This was the last meeting of these eminent men, all of whom were members of the same political party. Within a year the mutations in politics and the tragedy of war rendered any personal, professional, or social intercourse between them impossible.[1]

During this period two eminent lawyers filled the office of Attorney-General, Caleb Cushing, of Massachusetts, and Jeremiah S. Black, of Pennsylvania. Edwin M. Stanton served as Attorney-General during the last three months of Buchanan's administration. Of the lawyers who were admitted to practice in the Supreme Court during Campbell's term, Alonzo Taft, of Ohio, and Augustus H. Garland, of Arkansas, filled the office of Attorney-General subsequent to the Civil War; Samuel F. Miller and Horace Gray filled, with marked distinction, the position of Associate Justices; William Pinkney Whyte, Lyman Trumbull, Clement C. Clay, John H. Reagan, Charles Faulkner, and James R. Doolittle served terms in the United States Senate; Charles Andrews became Chief Judge of the Court of Appeals of New York.

[1] 24 Howard, vi.

Among the cases which brought interesting associations of attorneys into the Court were Corning *vs.* Iron and Nail Factory,[1] in which Thaddeus Stevens and Reverdy Johnson appeared together, with Horatio Seymour and William H. Seward in opposition; Forsyth *vs.* Reynolds,[2] in which Abraham Lincoln and Salmon P. Chase appeared on opposing sides, Lincoln winning the case. Of the attorneys practicing in the Court, Reverdy Johnson, of Maryland, and Judah P. Benjamin, of Louisiana, had the largest number of appearances. Badger, of North Carolina; Carlisle, Brent, May, and Edwin M. Stanton, of Washington; Janin, of Louisiana; George Ticknor Curtis, of Massachusetts; William H. Seward and William M. Ewarts, of New York; Thomas Ewing, of Ohio; S. Teackle Wallis and J. Mason Campbell, of Maryland; J. Louis Pettigru, of South Carolina; John J. Crittenden, of Kentucky, and Judge Benjamin R. Curtis frequently appeared.

William H. Seward had declared that the conflict between slavery and freedom was "irrepressible" and to be decided by an appeal to the "higher law," and Lincoln, while disclaiming any purpose to interfere with slavery as it existed in the States, announced as a truth which could lead to no other result, that the Union could not exist half slave and half free. Chase, in Ohio, was teaching the people that "the legislature cannot authorize injustice by law, it cannot repeal the laws of nature, cannot create any obligation to do wrong"; and that "upon

[1] 15 Howard, 451. [2] 15 Howard, 561.

the question of enforcement of the Fugitive Slave Law, partaking largely of a moral and political nature, the judgment of the Court must necessarily be rejudged at the tribunal of public opinion, the opinion, not of the American people, but of the civilized world." [1]

No matter how clear and how rigid the constitutional provisions relied upon for protection of slavery in the States, or the right to carry them into Territories, when large numbers of well-organized men in the free States became convinced that the institution was morally wrong and violated elementary human rights, such provisions could not be enforced. While in the North and rapidly growing West, those who wished to see slavery limited in its extent, and ultimately destroyed, differed in their method of accomplishing this result, they were in agreement in their purpose, and equally determined that constitutional provisions should not be so construed as to permit slavery to go into the Territories, or the Fugitive Slave Law to be enforced in the free States. It was, therefore, but a question of time when judicial decisions and the process of courts would be disregarded and, if necessary, forcibly resisted. Southern men knew and understood this truth full well. They knew equally well that, unless the slave-owner was permitted to carry his slaves into the Territories and receive the protection of the National Government, by a process of restriction and strangulation the system was doomed to ex-

[1] Hart, A. B.: *Salmon P. Chase*, 71, "Higher Law in the North"; Howe: *Political History of Secession*, 217.

tinction, and that the Southern States would, in a few years, be reduced to a minority in the Union and without power to protect their political or property rights. Southern statesmen saw this clearly. The record of their struggle to maintain what they conceived to be their constitutional rights and enforce its recognition constitutes an interesting and, in many respects, a sad story.

It is clear enough now, in the light of events, that they could not succeed. Whether by further compromise the inevitable fate of slavery could have been postponed, or its coming rendered less disastrous to the welfare of the then generation, is of no more than speculative interest. Whether gradual emancipation, with compensation, would not have brought, while in progress, complications and disastrous results to the peace and happiness of both races, is by no means clear. It was inevitable that, in the attempted solution of a problem containing so many conflicting factors and involving so many and such varied motives, mistakes should be made. Judge Campbell was alive to the dangers, and sought by all means in his power to divert them from his people and the country. When he failed, he bore his part of the common misfortunes with loyalty to his State and section, and this is the standard by which the conduct of all men under such conditions must be measured.

While quotations have been made with some fulness from several of Judge Campbell's dissenting opinions, it should not be assumed that he was, in the usual acceptance of the term, a "dissenting

Judge." A study of our judicial history, both State and Federal, vindicates not only the propriety of, but the valuable service frequently rendered by, well-considered, strongly reasoned dissenting opinions. Illustrations of this truth will readily occur to the mind of every intelligent lawyer.[1]

Judge Campbell was a consistent strict constructionist of the Federal Constitution and sensitive to infringement, by judicial construction, upon the reserved domain of State legislation and the judicial power vested in the State Courts. He knew full well, from the study of the history of nations and political institutions, that courts are among the most effective agencies in absorbing and centralizing power at the expense of local self-government by the amplification and enlargement of their jurisdiction. He knew that railroad companies, banks, and other corporations, with their rapidly increasing expansion in power and wealth, would seek in the Federal Courts a shelter from State control. While he did not claim finality in his opinions, he did not hesitate to express strongly his opposition to what he regarded as a menace to the reserved power of the States over these legal entities which they had "called into existence." While his views have not prevailed against what was probably the inevitable trend of thought, his opinions are of interest to the student of our judicial history as illustrations and expressions of the opposing schools of constitutional construction.

[1] Carson: "Great Dissenting Opinions," *Report, Am. Bar Asso.* (1894), 273.

In the development of constitutional law, the conservative, steadying influence of a great judge, although not always in agreement with his associates, is wholesome. This is especially true in our system of government, with its checks and balances, so essential to the preservation of the powerful yet delicate political and judicial mechanism.

In his opinions Judge Campbell discussed and applied to the facts general principles, sustained by citations from decisions of the Supreme Court and from civilians with whose writings he was probably more familiar than any of his associates. His style was clear and vigorous: his conclusions were stated concisely. In the resolutions adopted by the members of the Bar of the Supreme Court, upon his death, prepared by A. H. Garland, former Attorney-General, it was said: "He was a jurist of extensive and varied learning in the common and civil law as well, and accustomed to resort to the great sources of jurisprudence which are the school where proficiency can best be acquired in the art of applying the abstract principles of the law to actual cases."

Judge Campbell survived all of his associates on the Bench; hence we have no expression from any of them of their estimate of his services; none survived to pay tribute to him as he did to Judge Curtis in words of generous eulogy. As said by Governor Hoadly of Ohio: "He was the last survivor of that company of giants over which Roger B. Taney presided. . . . How well he performed his duties, how fully he fulfilled the expectation of the members of the Court who solicited his appointment, I need not

say. . . . We all know him as history has recorded him, as a grave, serious, careful, clear, logical, persuasive expounder of the law. As such his fame will go down to many generations yet to come." [1]

[1] *Memorial Addresses — Justice Campbell.*

CHAPTER IV

ON THE CIRCUIT: FILIBUSTERING AND THE SLAVE TRADE

Judge Campbell, in accordance with the provisions of the Judiciary Act and the custom then prevailing, presided over the Circuit Courts of the Southern Circuit. A distinguished member of the Bar of New Orleans says that his appearance was all that could be desired by the friends of order and government. "His presence attracted the attention of the public and his way of controlling and dispatching business justly brought him the reputation of being a great Judge." He was called upon to hear many important cases, involving, among others, questions arising out of the peculiar system of real estate law, based upon the French and Spanish Codes. We have no other record of his decisions and opinions than is found in the Supreme Court Reports in such cases as were carried to that Court by writs of error or appeal. His judgments in such cases were generally affirmed. The Bar of the Southern Circuit has, at all periods in its history, included lawyers of profound and extensive learning and marked ability, several of national repute. During the ten years immediately preceding the Civil War, among the most prominent were Alexander J. Porter, Edward Douglass White, George Eustis, Pierre Soulé, Charles M. Conrad, Louis Janin, Judah P. Benjamin, William H. Hunt, Leroy P. Walker, and Andrew White.[1]

[1] Warren, Charles: *A History of the American Bar*, 412.

Among the cases of more than usual interest which came before the Court was one in which the heirs of General Lafayette claimed a valuable body of land under the grant made by Congress to their ancestor. The New Orleans paper, referring to the trial, said: "Our new Circuit Judge, John A. Campbell, is giving some very remarkable illustrations of the promptitude with which he dispatches business. . . . Our lawyers, accustomed to the delays and tediousness, and never-ending complexities of trials in the United States Courts, have been greatly startled at the rapidity of Judge Campbell's decisions which, by the way, are as wise, able, and learned as they are prompt and lucid — *exempli gratia*, the decision which will be found in our paper to-day, involving the protracted and vexed litigation relating to the property in the rear of our city, claimed by Lafayette's heirs. The argument in the case was concluded on Thursday and the next morning Judge Campbell amazed the Bar by reading his decision in the case. . . . What a pity the Batture was compromised before Judge Campbell's accession to the Bench." The decree was affirmed on appeal to the Supreme Court.[1]

In the discharge of his judicial duties at New Orleans, Judge Campbell was called upon to express his views regarding the conduct of prominent men engaged in filibustering expeditions against Cuba and certain Central American countries, which brought him into sharp conflict with a strong public sentiment and illustrated his courage in the per-

[1] Lafayette *vs.* Kenton, 18 Howard, 197.

formance of his official duties. It is not necessary to enter into the history of the long and unsuccessful efforts to secure the freedom of Cuba. Reference will be made to them only so far as is necessary to understand the events which imposed upon Judge Campbell the discharge of duties bringing him into conflict with popular opinion.

Among other prominent citizens charged with violation of the neutrality laws in connection with the Cuban Rebellion was John A. Quitman, at that time Governor of Mississippi. Immediately upon learning of the indictment against him, Governor Quitman resigned his office and voluntarily appeared before the Circuit Court at New Orleans. The trial of Henderson and other persons indicted at the same term having resulted in the disagreement of the jury, a *nolle prosequi* was entered to the indictment against Governor Quitman, in February, 1851. But the failure of the Lopez expedition, with its tragic results, did not put an end to the agitation or formation of plans by American citizens for the invasion and ultimate annexation of Cuba to the United States. The situation had become so acute that President Pierce, following the example of President Fillmore, issued a proclamation warning the people against the violation of the laws of neutrality.[1]

At the Spring Term, 1854, of the Circuit Court at New Orleans, Judge Campbell charged the grand jury at length, regarding the neutrality laws, especially those provisions of the statute which declared

[1] Richardson: *Messages and Papers of the Presidents*, v, 272.

that an organization or combination formed for the purpose of invading Spain with force and arms was a violation of the neutrality statute; that it was not necessary that arms should be furnished to the men in the United States, or that the expedition should leave the United States. The evidence of such a plan would consist in the formation of companies, associates, or organized bodies of men in the United States, animated by a hostile purpose against the Spanish authorities and having, as their ultimate destination, Spanish territory, to accomplish that purpose with force. He instructed them that all who aided or assisted in the formation of such plans, by donations or loans of money; by the purchase or sale of securities for the payment of money issued by a revolutionary committee or government, if designed for the use of such an expedition and intended to facilitate it; by speeches, letters, or publications, advising, encouraging, or persuading persons to join in such enterprises, were equally guilty as those who actually took part in such expeditions.

In his construction of the Act of Congress he followed the decision of the Supreme Court in Kennett *vs.* Chambers.[1] He urged the grand jury to make diligent inquiry for the purpose of ascertaining whether any persons within the jurisdiction of the Court had violated the law. Referring to recent events in Boston, in connection with the enforcement of the Fugitive Slave Law, he said: "There is a consideration to fortify you in the performance of this duty, which is particularly operative at this

[1] 14 Howard, 24.

time. The exercise of some of the powers conferred in the interest of one section of the Union, inflicts a wound upon the sensibilities of other sections of the Union. Some of these powers are deemed of vital importance to this portion of the United States. We exact the fulfillment of the compact in which they are formed with strictness, and applaud the power that maintains them. Not long ago, one of the cities of the Northern section of the United States was involved in riot and disorder in the attempt to maintain these stipulations. This portion of the Union regards these expeditions with abhorrence, as designed to secure sectional advantages by piratical and lawless outrages; by the sacrifice of the faith of treaties and the prostration of national character. They offend their sense of right, jeopard their material interest, and mortify their national pride. How can we expect these people to maintain their compacts with us when we display indifference to those to which we are parties, and in which they are so deeply interested? No class or body of men in this quarter of the country should be countenanced in placing our communities in a condition so fatal to their own interest. In my judgment it is the duty of all good citizens to frown indignantly upon all such lawless enterprises and to aid the public authorities in maintaining the laws enacted to preserve the faith of the Union." [1] The charge was published in full in the New Orleans papers and elicited sharp criticism, the portion referring to the recent events in Boston being especially resented.

[1] Chase, F. H.: *Lemuel Shaw*, 176.

On July 1, 1854, the grand jury made a report to the Court, stating that they had cited a number of citizens before them as witnesses, for the purpose of ascertaining whether, as rumored in the city, there was an expedition on foot, the tendency and purpose of which was to violate the neutrality laws of the United States. Among the witnesses cited were several whose names figured most prominently with the rumored expedition, who declined to testify on the ground that to do so would criminate themselves, under the ruling of the Court. They also reported that the impression had been made upon their minds that the rumors were not altogether without foundation; that they inferred that meetings had been frequently held upon the subject of Cuban affairs; and that what were termed Cuban bonds had been issued and funds had been collected either by contributions or sale of the bonds, or promises to pay, to a considerable amount, which would be at the disposal of Cuban revolutionists; but that they had not been furnished evidence upon which they could find a bill of indictment against any one. They laid before the Court the names of those persons who had refused to testify. The grand jury further reported that they were of the opinion that, while much had been written in regard to the subject, the facts were overrated and magnified, nothing like a military organization or preparation having been brought to their notice. That there were a large number of citizens of the United States whose feelings and sympathies were deeply interested in behalf of what was termed the Creole or native population of the Island of Cuba,

there could be no question. However, they did not think any organized plan existed looking to a military expedition or hostile movement. The grand jury deemed it inexpedient to prosecute the examination of witnesses any further at the present time, but declared that they would continue to make diligent inquiry in relation to the subject and report further to the Court.

Upon receiving the report, Judge Campbell directed it to be spread upon the minutes of the Court and a copy transmitted to the Secretary of State. He expressed his gratification at the action of the grand jury and said that the language which he had used was that of the Supreme Court. He said that he would require the witnesses who had declined to testify to enter into bonds with security to obey the laws of the United States, and thereupon issued an order requiring John A. Quitman, J. S. Thrasher, and A. L. Saunders to appear at an hour named to show cause why they should not be required to give such bonds to obey the laws for nine months. At the hour named General Quitman appeared and said that, upon being informed that a subpœna had been issued for him, he had appeared voluntarily before the grand jury; that he had been dismissed by the jury, and now wished to know if he was accused of any offense, and if so of what nature and who was his accuser. He desired to behave with all respect to the Court, but also to maintain his rights as an American citizen.

Judge Campbell said that General Quitman's question was pertinent, explained to him the report

of the Grand Jury, and referred to several matters not appearing in the report. General Quitman replied that he was at a loss to understand how what occurred before the grand jury became public; that, so far as he was concerned, the report was not correct, as he had not stated that an answer to any question asked him would tend to criminate him. In defense of his right as an American citizen, he would refuse to enter into a bond unless subjected to such duress as conflicted with his duty to others. He called attention to the fact that no affidavit had been made, no specific offense charged, and the report of the grand jury was vague. To the suggestion by the Judge that he could take time to investigate the law, General Quitman replied that he preferred to have the matter brought to an issue at once, and was willing to be considered as having declined to answer the question submitted to him by the grand jury.

After discussion by Mr. Waul, counsel for Quitman, and Mr. Moise, the District Attorney, Judge Campbell stated that he had investigated the authorities and reached the conclusion that, not as punishment for a crime committed, but for preventing the commission of a crime, of which the Court found reasonable ground to apprehend, he had the power to require the respondents to enter bond to obey the law, and that he would be recreant to his duty if he failed to do so. An order was entered accordingly. But Quitman and the other respondents raised the question whether, upon the report of the grand jury alone, without affidavit, or any act com-

mitted or threatened in the presence of the Court, the Judge could *ex mero motu* require them to enter into such a bond, and they refused for the time being to do so. The Judge, however, was firm in his opinion, and promptly ordered the defendants, as he inaccurately termed them, into the custody of the marshal. His action brought forth such a storm of criticism and denunciation from the newspapers which sympathized with the filibuster movement that he filed with the Clerk an opinion setting forth the grounds upon which he based the order and the authorities sustaining his position. A copy of the opinion was furnished to the city papers by the Clerk, at their request. Judge Campbell referred to Quitman as "an accomplished soldier, having a large share of the public confidence, especially in those States which border on the Gulf of Mexico." He was a man of marked ability, had won fame as a soldier in the Mexican War, had filled with distinction the office of Chancellor, and had been elected Governor of Mississippi. At the time of his controversy with Judge Campbell, he was the most popular man in Mississippi. Quitman's answer was a spirited defense of his course and a severe arraignment of the Judge for the manner in which he had dealt with him. He filed the bond, as required, under protest. The editorials attacking Judge Campbell disclosed the existence of public sentiment favoring the liberation of Cuba. This fact was the ground of the attack on the Court.

A well-prepared and temperate article was published in the "True Delta," signed "S. N. T.," who

was described by the editor as "an esteemed and able jurist." It is probable that the author of this article, written at the time, has given a fair account of the incident which subjected Judge Campbell to the criticism of the partisans of the Cuban cause. He says: "Undoubtedly the people of this city are much in favor of the annexation of Cuba to our Confederacy and sympathize strongly with all efforts of the population of the island to effect that object. Yet it is also true that we entertain a deep respect for the laws of our country, as well as for the persons of those who fill judicial stations, and it is not in our nature to be otherwise than dissatisfied at seeing an upright Judge, no less conspicuous for his probity than his great legal acquirements, openly accused of arbitrary conduct in office, dangerous to the liberties of the citizen, and hostile to those principles of constitutional and common right which are at once the guide of the magistrate, the shield of the citizen, and the protection of society." He proceeds to examine the charges contained in General Quitman's letter, and points out, by reference to the record made by the grand jury, and the occurrences in the court-room, that they are either without foundation or inaccurate.

In regard to the legality of Judge Campbell's action, the writer says: "There is probably no doubt in the mind of any one who has examined the law. To the thorough vindication of that right contained in Judge Campbell's opinion, no one will be presumptuous enough to believe that they can offer any improvement; no attempt of the kind will be made

here; none can read it without being convinced." After quoting from the Federal statute conferring upon Federal Judges the power to hold persons to the security of the peace and for good behavior in cases arising under the Constitution and laws of the United States, he says:

"Those powers are ample; they clothe the Judge with all the powers of those magistrates whose peculiar function it is to guard, by preventive measures, that peace which is the sole foundation of the social structure and in comparison with which all individual rights are necessarily subordinate. . . . Whether Judge Campbell had sufficient ground to act upon, in the case of General Quitman, some may be disposed to doubt, some to deny, but it will be difficult for any cool and candid man to review the whole case and say that, under the circumstances, Judge Campbell was not right; and it is believed that there is not a man in New Orleans who will be unwilling to admit that the Judge acted under the deepest and most enlightened sense of his responsible duties.

"None will more cheerfully accord to General Quitman, than the writer of these lines, the full meed of praise for all the noble deeds he has done for his country; none follow him more ardently in his aspirations for the extension of American institutions to the people of Cuba; but truth should be vindicated at whatever cost; and the extension of American principles will need no attack upon the integrity and honor of the American Judiciary."

A distinguished lawyer who witnessed the course

pursued by Judge Campbell said: "No man could have borne himself with more dignity or wisdom, in the severe ordeal to which he was then subjected. . . . There never was a nobler spectacle presented in a Court of Justice, than this magistrate wisely and calmly controlling turbulence and vindicating the majesty of the law." [1]

George E. Badger, referring in the United States Senate to the courage exhibited by Judge Curtis, presiding at Boston, and Judge Campbell at New Orleans, said: "I refer to the fact merely of the excitement — the popular outcry and the manly firmness of the Judges. I ask how important it must be — how inexpressibly important for our Country and its institutions it is, and must ever be, to have the Bench adorned by magistrates possessing and exhibiting such qualities, by men standing like a rock, against which the waves of popular passion and the tumultuous outbursts of angry and excited and seditious men may harmlessly break, leaving the lofty and august form of judicial power uninjured and towering far above them." [2]

At the June Term, 1858, of the Circuit Court at New Orleans, Judge Campbell was called upon to try the case against William Walker and Frank Anderson, for violation of the neutrality laws in organizing an armed force and invading Nicaragua and Costa Rica. In his charge to the grand jury, prior to the finding of the indictment, Campbell reviewed

[1] Bayne, Thomas L.: *Memorial Addresses — Justice Campbell.*

[2] An interesting history of General Quitman's connection with the "Cuban Cause" is given in Claiborne's *Life of General John A. Quitman*, II, 196 *et seq.*

the neutrality laws of this country, concluding with the instruction: "No citizen of the United States, within its territory or jurisdiction, can accept and exercise a commission, or enlist as a soldier, marine or seaman; or engage another to enlist as a soldier, seaman, or marine, or to go beyond the United States to do so, to serve against a State, people, colony, or sovereign, with whom the United States are at peace. Nor can they, within our ports, fit out or arm, or attempt to procure arms, or be concerned in such acts."

The jury failed to reach a verdict and the District Attorney entered a *nolle prosequi*. Judge Campbell required the defendants to enter into security, binding them to obey the neutrality laws. Walker and his friends, as appeared to be customary in such cases, criticized the Judge in a public speech. A newspaper controversy resulted in which, of course, Judge Campbell took no part.

In connection with, and as an incident of, this trial, Judge Campbell was tendered a public dinner by a number of citizens of Mobile. "As a testimonial of the estimation in which they continue to hold you for the learning, firmness, and purity with which you have discharged the duties of your exalted position." Percy Walker, a brother of General William Walker, joined in the invitation, saying that, while he sympathized with his brother's efforts to "Americanize Nicaragua, and did not approve of several of Judge Campbell's acts, and while, as a private citizen, his anxiety to secure for the Southern States a controlling position in Central America might

cause him to trench closely upon a breach of the neutrality laws, yet he had no right to condemn a Judge for enforcing them."

Judge Campbell, in declining the invitation, wrote: "The station I occupy is one of grave responsibility and its duties are full of difficulties. A declared object of the Constitution of the Union is to establish justice, and of the justice of the United States the Supreme Court is the special depository. . . . The very nature of this jurisdiction compels the judicial magistrate of the Union to disregard those attachments and to control those affections which would give a preference to special interests or local advantages. In favor of the general law, he must restrain the aggressive selfishness, or restless egotism, that would evade or subvert it; he can make no compromise with the lawlessness, force, caprice, deceit, or cunning that would overturn a policy of the Union. He can have no other aim than to maintain the Constitution and the laws, and the treaties that conform to it, in the fullness of their spirit and the exactness of their letter with honor or safety. This has been the object of my judicial life."

At a Special Term of the Circuit Court at Mobile, November, 1858, Judge Campbell delivered a charge to the grand jury, which subjected him to criticism from those who were engaged in attempts to revive the slave trade. He denounced the traffic as piracy, and urged the grand jurors to discharge their duty by bringing in bills of indictment against those who aided and abetted, directly or indirectly, in violating the statutes. He called their attention to the fact

that offenders against the law hoped to escape through the failure of the officers to perform their duty; that they relied upon a depraved and dissolute public sentiment favoring the slave trade, or a belief that sentiment can be so debauched in regard to the Federal Union and Government that a firm, steady, and exact administration of the law can be prevented against the slave trade; that those who held such opinions expected the law to be nullified by the failure of grand and petit juries to discharge their duty. He further said that it could not be denied that numerous instances of eccentricity on the part of juries had brought reproach upon, and some distrust of, this great institution of the common law; that the Court had received information, but not evidence, that persons engaged in carrying on the slave trade had imported African slaves into the District; that they had sold, purchased, and disposed of them here in violation of the laws of the United States. He told the grand jurors that they had been called together for the specific object of making diligent inquiry into the charge that the law was being violated; that he had entire confidence that they would discharge their duty.

At the May Term, 1858, of the Court at New Orleans, the "New Orleans Bulletin" said: "Judge John A. Campbell delivered an elaborate charge to the grand jury, in regard to the African slave trade. . . . He gave a history of the legislation of the various Congresses upon this subject, extending from the Continental Congress in 1774 down to the final acts of 1820, all going to show in what light the

trade was held by men of all parties and from every portion of the land, including all the illustrious men of the country, and expressing the conviction of the Court that the same feelings and opinions which have prevailed for so long a period upon the subject still prevail in the minds of a vast majority of the people of the United States, East, West, North, and South."

The "Savannah Republican" referred to the charge delivered by Judge Campbell as "one of the ablest and most decided" that the editor had ever read, saying: "It is devoted exclusively to the slave trade and filibusterism, and reasserts, more pointedly and emphatically than before, all the general positions which the same honest, fearless, and independent jurist assumed in reference to those subjects in his charge to the grand jury, at the same place some months before, and was delivered, as the papers inform us, with an earnestness that elicited profound attention. The Judge is thoroughly in earnest, and intends that, so far as depends on him, the laws shall be fully executed in letter and spirit. That this course of Judge Campbell will raise him in the estimation of the great mass of respectable and intelligent citizens of the country, South and North, East and West, irrespective of party, cannot, for a moment, be doubted. He has shown himself the incorruptible and fearless Judge who plainly lays down the laws and calls upon his sworn co-associates to perform their whole duty in executing them to their fullest extent."

Judge Campbell had given to the institution of

slavery, in all of its aspects, anxious thought and careful study. He wrote for the "Southern Quarterly Review" [1] an article in which he traced the origin of slavery in different countries and conditions, including its introduction into the American Colonies. He examined and analyzed the debates in the Convention of 1787, followed with a history of the rise and progress of the movements in England and America for its abolition, and discussed the effect of these movements upon the relation of the master and slave. He was not concerned in the defense of the institution or the course pursued by its advocates or opponents, but rather with the duties and responsibilities imposed upon the governing class. Regarding the situation in the United States and the duty of the Southern people, he says:

"We do not resist the conclusion that the Southern States are environed by difficulties of a trying character, and that the counsels of cool, dispassionate, and circumspect statesmen are needful for their removal. . . . The experiments in the islands of the West Indies, by the different European Powers, fully prove that the negro race is susceptible of great improvement and thrives by liberal and indulgent treatment. Our own experience confirms the same fact, and we believe the intercourse between master and the slave in the Southern States is, in general, that of kindness and good-will. Some of the codes of the States, however, do not bear that expression, and we think that a general mitigation of the punishments for crime might be effected without im-

[1] June, 1847, XII, 91.

pairing the efficacy of the punishment. Some of the provisions of the codes are the remnants of British Colonial legislation, and others have been introduced under circumstances of excitement. They remain without execution and serve only as arguments of reproach.

"A more important alteration of our laws consists in the extension to slaves of a protection in their domestic relations. The connection of husband and wife, and of parent and child, are sacred in a Christian community, and should be rendered secure by the laws of a Christian State. The Church, centuries before the abolition of personal slavery, restrained by personal censure the power of masters to separate husbands and wives. Louis XIV, in the 'Black Code' for two colonies, introduced provisions for the same object. The Southern Churches require their members (slaves) to form permanent connections. There is an obvious propriety in placing them under the protection of the laws.

"A reform scarcely less important consists in rendering the relation of master and slave more permanent. It is now liable to be disturbed in every change that occurs in the pecuniary condition of the master. The liability of the slave to change his relation on the bankruptcy of his master, and the frequency with which it occurs, has greatly deteriorated their character and deprived the relation of some of its patriarchal nature. The condition of families should be permanent. Those domestic relations which contribute so much to the happiness of the members should not be severed at the pursuit of a creditor.

The great end of society, the well-being of its members, would surely be promoted by withdrawing slaves, in some measure, from the market, as a basis of credit. In reference to this same subject, we may point to the necessity of a greater diversity of employments among the slave population and a consequent increase of their mental cultivation; to the prodigious increase of their numbers and the necessity for more abundant supplies of moral and religious instruction.

"We sum the whole of our duties in adverting to the fact that our systems were formed when the blacks were fresh from their native Africa, with gross appetites and brutal habits; that their numbers were, in comparison, trifling; and that they were considered with simple reference to their relations with their masters. They form now a large and continually growing community; within this century they will number 10,000,000. We must not expect that the regulations which suited their first condition can continue, or will be appropriate. A statesman could fulfill no task more useful than that of adapting our laws to the varying wants of our society. We know of no responsibility more sacred than that which devolves upon the directing minds of our Southern States, of maintaining sound principles on this subject. We ought not to ally ourselves with the worn-out maxims of other ages, but maintain steadily and systematically the ascendancy of those principles of progress and amelioration which are the vital essence in the growth of a well-organized society."

Judge Campbell was a member of the Convention of the Southern States held at Nashville, Tennessee, June 6, 1850, and introduced the resolutions which, with slight change, were adopted, setting forth the attitude of the people of the Southern States in regard to slavery in its relation to the Territories.

CHAPTER V

EFFORTS TO AVERT CIVIL WAR

Judge Campbell had avoided being drawn into the turbulent political currents which, under the influence of men, North and South, of extreme views and revolutionary purposes, were rapidly carrying the country into civil war. He had devoted his entire time to the discharge of his judicial duties, as shown by the Supreme Court Reports, at each term writing his proportionate share of the opinions. Several editorials appeared during the spring of 1860, referring to Judge Campbell as a possible, if not probable, compromise candidate for the Presidency. They suggested his acceptability to the Northern Democrats, if Judge Douglas could not be nominated, referring to the position which he had taken and his courage in dealing with attempts to violate the statutes prohibiting the slave trade and filibustering. There is no evidence that he took any notice of the suggestion and it is quite certain that he had no political aspirations. Like all other thoughtful men, he could not fail to see and be impressed by the dangers threatening the peace of the country, as the political parties divided along sectional lines, with the certainty that the more conservative elements were being swept aside by those who were determined to force the question of slavery to the forefront.

The campaign of 1860, resulting in the election of Mr. Lincoln by a strictly sectional vote, strengthened

Campbell's fears and excited his apprehension in respect to the course which the Southern leaders would take. In a letter to his brother-in-law, Daniel Chandler, of Mobile, Alabama, referring to the election, he wrote: "The election for electors of President and Vice-President, having resulted in favor of the Republican Party, the persons chosen by them must be inaugurated if the Constitution and laws are to remain in force. The single question is whether the fact of their election affords a legitimate cause for the overthrow of the Union, of the Constitution and laws, and a consequent dissolution of these States. I shall not consider the question of the natural, moral, or constitutional right of the people of Alabama to dissolve the Union. My purpose is simply to consider the reasons assigned for exercising the right, supposing it be conceded."

After setting out the preamble and resolutions of the General Assembly of Alabama calling a convention, adopted prior to the election, discussing the attitude of the Republican Party toward slavery, he says: "But the question is, whether Mr. Lincoln will come to the Presidential office with 'the unmistakable aim to pervert the machinery of government to the destruction of its members.' Does this election show an integral of mischief, calculation, malice, dispositions, regardless of constitutional or confederate obligation, and fatally set to work wrong and injustice? No man, no body of men, is authorized to arouse the evil passions, the restless desires, proscription, hate, revenge, incident to revolution; nor to disturb the clear and written law, the

deep-trod footmarks of duty, quiet, content, and repose of civil society, upon grievances, speculative and contingent, or upon the apprehension of evils that are not imminent and beyond the reach of regular and constitutional modes of redress."

After pointing out the constitutional limitations upon the Executive and referring to instances in the history of the country, especially the election of Jefferson and Jackson, when excited apprehensions, arising from intense political feelings and passions were not realized, he says: "The fact that Mr. Lincoln has been chosen President of the United States, in my opinion, is not sufficient cause for the dissolution of the Union. The circumstances of his election impose the duty of moderation on his part and circumspection on the part of his supporters in all that concerns the irritating and disturbing question of slavery. He is under an imperious necessity to mould his measures of administration so as to conciliate the sober and calm judgments of the people. I do not fear the influence of his party over him or his own disposition. There is a radical division in his own party, and he was chosen because he was more conservative and constitutional in his opinions and ideas than his opponent. My inquiries of most respectable and reliable gentlemen who know him, confirm me in this opinion."

In another letter to Chandler, two days later, referring to Seward's use of the words "irrepressible conflict," Judge Campbell says that he did not attach to them the same importance as many others had done, and concludes his discussion by repeating

the opinion that the election of Lincoln did not afford sufficient ground for dissolving the Union. He insisted that the legal status of slavery in the Territories was upon a satisfactory foundation: that the subject of the rendition of fugitive slaves could be adjusted to the satisfaction of the owner, and that separate State action would result in the discredit and defeat of every measure for reparation and security. He says: "My commission will not be affected by the action of the State. But I determined, many years ago, that my obligation was to follow the fortunes of her people. I shall terminate my connection with the Government as a consequence of her acts." This letter was published in the Mobile "Daily Mercury," May 17, 1861.[1]

On January 21, 1861, Campbell wrote to Chandler, "I think the result of the entire movement [in Alabama] will be injurious to the other States."

His letters and conduct establish, beyond controversy, that he understood and appreciated the grave situation by which the Southern people were confronted. He was of the opinion that they were entitled to expect and to demand the recognition and enforcement of their constitutional rights in the Union. His views in respect to these rights and the extent of the power of Congress to restrict them were expressed in his opinion in the Dred Scott case. He also believed that, unless these rights were recognized and protected, and unless the agitation of the question of slavery within the States

[1] George W. Duncan, Alabama Historical Society Transactions, 1904, vol. 5. Reprint, 33.

should cease, the Union would be dissolved, but that if the people were guided by moderate counsel and patriotic purpose, this calamity could be averted.

The discussion was rapidly passing from the domain of law into a sphere where sectional hatred and passion controlled, and those who represented and expressed these feelings and passions in both sections of the country were in control. Many thoughtful, patriotic, patient men hoped and believed that, by the recognition of constitutional obligations and enforcement of constitutional guarantees, the peace of the country could be maintained and the Union preserved. These men did not comprehend or appreciate the intensity of feeling and the far-reaching effect of the agitation which was being carried on by the extreme men of both sections. It is supposed, and is probably true, that of those who had a clear conception of the character of the controversy and the ultimate outcome of the struggle, Lincoln stood in the forefront. He had declared in his debate with Douglas that "a house divided against itself cannot stand," and yet, on December 22, 1860, he wrote Alexander H. Stephens:[1] "Do the people of the South really entertain fears that a Republican Administration would *directly* or *indirectly* interfere with the slaves or with them about the slaves? . . . The South would be in no more danger in this respect than it was in the days of Washington. . . . You think slavery is right and ought to be extended, while we think it is wrong and ought to be restricted. That, I sup-

[1] Stephens, A. H.: *The War Between the States*, II, 266.

pose, is the rub. It certainly is the only substantial difference between us."

Judge Campbell's letters, during these months, expressed deep solicitude and anxiety, with a fixed purpose to do all in his power to allay excitement and counsel the people to sanity of thought and moderation of speech and action. He insisted that the election of Lincoln did not justify the action or movements of extreme Southern leaders looking to a dissolution of the Union. On December 19, 1860, he wrote former President Franklin Pierce that he had conferred with the President and advised him to send accredited commissioners to each of the States in which it was proposed to hold conventions. "There is," he said, "a wild and somewhat hysterical excitement in all the Southern States, and especially in the tier of States from South Carolina west to the Mississippi. . . . Those who have attempted to withstand the current require support from without. I have stated to the President that I know of no other persons in the United States whose influence could be exerted so effectively in Alabama as yours, and I thought that you would not hesitate to do whatever lay in your power to mitigate or to avert the calamity of a disunion of the States. . . . I believe that a final settlement of this slavery question should be made, or that disunion should follow. Agitation cannot be carried on further without a civil war. The question is for both sections, Shall we part in peace, or shall we make a constitutional settlement of every open question? I think that a constitutional settlement, at all events, is

better, far better, than a sudden and violent disruption."

Pierce, replying to this letter, said: "I doubly honor the devotion with which you cling to the Union." He expressed the belief that, notwithstanding the "gloom, which has overshadowed us for the last few weeks, seems to be now shutting down more closely, densely, darkly," the people of the Northern States would secure to those of the South their constitutional rights, saying, "Many of them, I have no doubt, are reading to-day with new light and profound surprise the concise and masterly address of Ex-Chief Justice Shaw, Ex-Justice Curtis, Chief Justice Parker, and their associates."[1]

On December 29, 1860, Campbell wrote Pierce that he had submitted his letter to the President and Judge Nelson, "both of whom approve it strongly and suppose that its publication in Alabama would be of service at this juncture." He writes despondently of the future, being convinced that the radical element would control, and concluding his letter, says: "I cannot hope that the United States more than any other country can be, for any great length of time, exempt from threatening civil commotions. They have existed at other periods of our history and we must expect them to recur. This controversy in respect to slavery disturbs the foundations of the social system. It renders not only property insecure, but disturbs the repose and order of the family as well as the community. Throughout

[1] Curtis: *A Memoir of Benjamin R. Curtis*, I, 327; Chase: *Lemuel Shaw*, 177.

the South there are rumors of insurrectionary attempts and conspiracy promoted by white men, suspected of being sent to the South for the purpose. I suppose that many of these rumors have no foundation and that all the facts of any case are exaggerated. But no community can exist and prosper when this sense of insecurity prevails."

The attitude of the men who hoped for and believed compromise possible is illustrated by a conversation between John J. Crittenden, William H. Seward, Stephen A. Douglas, and Judge Campbell in February, 1861, of which Campbell made and preserved a "memorandum," in which he wrote:

"At a dinner given by Senator Douglas to the French Minister Mercier, quite a large party was collected. Among the guests were Crittenden, Seward, of the Senate, General Wilson and Miles Taylor, of the House of Representatives. During the dinner Mr. Seward was called on for a sentiment. He required the company to fill their glasses to the brim and drain them to the bottom; that his was the sentiment which was worthy of that homage and that all could join in rendering it. His toast was: 'Away with all parties, all platforms, all previous committals, and whatever else will stand in the way of restoration of the American Union.'

"After that dinner was over, Mr. Crittenden and myself engaged in an earnest conversation upon the subject of his resolutions and the condition of the country. While I was speaking to him on the subject of slavery, he ran from his seat and said that Seward must hear the conversation. He left me and found

Mr. Seward and brought him back requesting me to repeat what I had been saying to *him*. My observations were that slavery ought not to form a cause for the dissolution of the Union; that it was a transitory institution and would necessarily be modified or abrogated in the process of time; that it had been regularly receding to the South and Southwest since the adoption of the Constitution, and now more rapidly than at any time before; that so regular was the immigration that it almost followed a law and that its progress might be calculated; that the States at the mouth of the Mississippi River were the most favorably situated for the maintenance of the institution, and although these had been opened to immigration for more than half a century, they were not yet supplied; that immigration was setting rapidly to them from the border States; that any political action to affect slavery must operate in these States to be effectual, and that for twenty-five years, the wants of these States would not be supplied with slaves, nor would the tide of emigration go beyond them. Mr. Seward said, 'Say fifty years.' I continued that Congress had already adopted a resolution to amend the Constitution to protect slavery from the action of the Federal Government in any form, and, therefore, that no operative action could be taken, politically, for fifty years. Mr. Seward said, 'My amendment contains the gist of the whole matter.' I replied that I regarded his amendment as the most far-reaching and important measure that could be presented on that subject, and that, coming from him, I regarded it as a concession, for that he had taught

the Northern people that the power to amend the Constitution had been given principally to enable them to abolish slavery in the States if the States did not do so. Mr. S. said, 'I know it, Sir, I know it.' I continued that slavery being preserved in the State, the only open question as to it was as to slavery in New Mexico; that the Territory had been opened for slave emigration for ten years and only twenty-nine slaves had been carried with them. He said, 'Only twenty-four, Sir.' I asked him how he could reconcile it to himself as an American statesman to suffer the American Union to be jeoparded by any question concerning slavery in a Territory where, after an opportunity for ten years, only twenty-four slaves had been carried. Mr. S. went to a center-table, poured some brandy into a glass, and was joined by Mr. Crittenden and Mr. Douglas. He said to them, 'I have a telegram to-day from Springfield, in which I am told that Simon Cameron will not be Secretary of the Treasury and that Salmon P. Chase will be, and that it is not certain that Simon Cameron will have a place in the Cabinet, and my own position is not fully assured. What can I do?' They replied, 'I see your situation,' the one echoing the sentiment of the other."

That Judge Campbell believed that a State had a right, when a majority of its people in convention assembled so determined, to secede from the Union, was well known. He had ten years before publicly declared his opinion in regard to this question. In a letter of August 13, 1850, addressed to a mass meeting in Montgomery, he said: "Whenever the Federal

Government, and, much more, when a single department of the Federal Government, upon a question — a question as to disputed title to property — shall venture to employ the army and navy of the Confederacy to subdue one of its members, it is clear that the very foundations of the Union are at once subverted." In an article in the "Southern Quarterly Review" (January, 1851), he wrote: "A State may dissolve its relation to the Union at its pleasure. Most of the States have declared the inherent and inalienable power of modifying their government as the fundamental principle of their social compact, and some of the States, in their act ratifying the Federal Constitution, plainly and unequivocally asserted and reserved it." This he was taught at West Point.[1]

The State of Alabama adopted an ordinance of secession, January 11, 1861. By this act on the part of that State, Judge Campbell was placed in a very embarrassing position. He had, as we have seen, declared that while he advised strongly against it, and regarded it as unwise and unjustifiable, he would, in obedience to his conviction in respect to his ultimate allegiance, resign his position and return to the State.

To understand correctly his course during these days of trial, in which so many honorable, patriotic men, both North and South, were in doubt as to where their duty led, it is necessary to give, as nearly as possible in his own words, a history of his acts and the motives which controlled him. Fortunately

[1] Gordon, A. C.: *Figures from American History, Jefferson Davis,* 17.

he made at the time and carefully preserved a record of his own conduct and that of others with whom he acted.

In the negotiations relative to the evacuation of Fort Sumter, Judge Campbell bore an important part. His conduct in this matter gave rise to much discussion and subjected him to misrepresentation and criticism.

By reference to a few historic facts we are enabled to understand his course better than could his contemporaries. The seven South Atlantic and Gulf States had passed ordinances of secession and their delegates had assembled at Montgomery, Alabama, formed a Southern Confederacy, and established a Provisional Government. Fort Sumter and other Southern forts were still garrisoned by Union troops. General P. G. T. Beauregard, with a force of Southern troops, had taken possession of Fort Moultrie. For manifest reasons the Provisional Government strongly desired the evacuation of Fort Sumter. President Buchanan was severely criticized in the North for his failure to reinforce its garrison. The Montgomery Government sent commissioners to Washington for the purpose of negotiating with the President upon the subject of the evacuation of Fort Sumter. Both parties were deeply concerned respecting the course which the border States, Maryland, Virginia, North Carolina, Tennessee, Kentucky, Missouri, and Arkansas, would pursue. Although the efforts at compromise of the slavery question, which had been made during the winter of 1860 and 1861, had failed, thousands of patriotic

men, devoted to the Union and praying for its preservation, had not lost hope that some adjustment would be made satisfactory to those border States. The motive for securing a compromise was to hold them in the Union.[1] For this reason twenty-one States accepted the invitation of Virginia to send delegates to a Peace Congress, which assembled at Washington, February 24, 1861.[2]

The hope that a solution of the questions at issue would be found was well supported by the result of the elections held for delegates to conventions in the border States during the spring of 1861. It was believed that if the *status quo* could be maintained and no act of coercion resorted to until the Union sentiment in those States could be crystallized, they would be saved to the Union and ultimately the other Southern States would rescind their ordinances of secession and return to the Union. This opinion was not confined to the Southern States.[3]

The elections showed that a large majority in the Convention of Missouri were opposed to secession.

The Legislature of Kentucky refused to call a convention.

In Tennessee the majority of the popular vote against calling a convention was more than 6700.

In North Carolina the people voted against calling a convention, and elected, if called, a majority of Union men as delegates.

[1] Rhodes, J. F.: *History of the United States from the Compromise of 1850*, I, 289.

[2] Curtis: *Life of James Buchanan*, II, 439.

[3] Bancroft, Frederic: *Life of William H. Seward*, Appendix. Letters from John A. Gilmer and others to Seward.

A majority of the delegates in the Virginia Convention were opposed to secession.[1]

It was also understood that Virginia and North Carolina, upon an attempt to coerce the Southern States, would immediately adopt ordinances of secession, and the sequel showed that this was true.

Such was the opinion of Judge Campbell, and because of it, at the invitation of Judge Nelson, he undertook a mission of which he has preserved a complete record, the accuracy of which is sustained by abundant testimony coming from witnesses not open to the suggestion of favor to him or to the Southern people. The statement made and preserved by him, entitled "Facts of History," puts the transaction, in all of its aspects, so clearly that any abridgment of it would mar its completeness. He writes:

"On the 15th of March, 1861, I casually met Mr. Justice Nelson, of the Supreme Court of the United States, on the Pennsylvania Avenue, Washington City, returning from a visit to Mr. Secretary Seward at his office. He informed me that he had a full conversation with Mr. S. upon the laws relating to navigation, commerce, and revenue and the impediments to the execution of those laws (without additional legislation) in consequence of the ordinances of secession in the Cotton States. These impediments, in his opinion, would be insuperable, except by the use of military force and danger of an immediate civil war. He told me that Mr. S. expressed his obligation for the conversation, and his satisfac-

[1] Stephens: *The War Between the States*, II, 364–68; Munford, B. B.: *Virginia's Attitude Toward Slavery and Secession*, 257.

tion to find impediments to war — 'that his policy was that of peace, and that he would spare no effort to maintain peace.' Judge N. further informed me that the Commissioners of the Confederate States had written a letter requesting a reception and that negotiations should be opened, which was a matter of embarrassment to Mr. S.; that the Administration was adverse to the reception of the Commissioners, and Mr. S. thought, if they returned home with an answer of refusal, it would produce irritation at the South, excitement and counter-irritation at the North, to the jeopardy of counsels of peace.

"I returned with Judge Nelson to his hotel and had a free conversation upon the matter last mentioned. Our conclusion was that the country would be better satisfied and the counsels of peace promoted by the reception of the Commissioners and obtaining from them a full exposition of their demands and the reasons on which they were founded; that this could be done, without any recognition of them as officers of an organized government authorized to hold diplomatic relations, or any recognition of the Confederate Government itself as a subsisting or valid representation of the seceding States. We returned to Mr. Seward's office to enforce these views upon him. Mr. Seward heard what we said with courtesy and attention, and replied to it: That not a member of the Cabinet would consent. 'Talk with Montgomery Blair and Mr. Bates, with Mr. Lincoln himself, they are Southern men, and see what they say,' said Mr. S. No one of them would agree. 'No,' he proceeded,

'if Jefferson Davis had known of the state of things here, he never would have sent those Commissioners. It is enough to deal with one thing at a time. The surrender of Sumter is enough to deal with.' He took from his table a letter from Mr. Weed, whom he described to be a statesman and a patriot, and read to this effect: 'That the surrender of Sumter was a bitter pill; that it would damage the party in the elections; that he was sure he could have made a better arrangement with the Commissioners; that they would have been willing to allow Major Anderson's force to remain in the fort, without molestation, to purchase supplies in Charleston, and his regret was for having left Washington before something had been concluded.' I had not before this had a hint of the proposed evacuation of Sumter, and replied to Mr. Seward that I fully agreed with him that only one matter should be dealt with at a time and that the evacuation of Sumter was a sufficient burden upon the Administration; that too much circumspection could not be employed to prevent agitation or excitement of the public mind. I said I would see the Commissioners on the subject and also write to Mr. Davis. 'What shall I say on the subject of Fort Sumter?' He said: 'You may say to him that before that letter reaches him (How far is it to Montgomery?)' 'Three days.' 'You may say to him that before that letter reaches him the telegraph will have informed him that Sumter will have been evacuated.' 'What shall I say as to the forts in the Gulf of Mexico?' He said: 'We contemplate no action as to them; we are satisfied with the position

of things there.' I agreed to see the Commissioners on that day, and to obtain their consent to a delay of their demand for an answer to their letter, and would afford him an answer. Mr. S. said he must have an answer that day, and if I were successful I might prevent a civil war.

"I called upon Mr. Crawford, one of the Commissioners, and informed him that I desired to write a letter to Mr. Davis; that I wished him to defer any call for an answer to his letter to Mr. Seward asking a reception or recognition of his public character until Mr. D.'s reply was received. He objected. He said that the Commissioners had been sent to obtain a recognition from the United States and a peaceful settlement, and if they could not have those that they would return to their people and that their people might know what they had a right to expect. I informed him of the contemplated action as to Sumter, of the probable continuance of affairs in the Gulf without alteration, and what the conditions might be of hasty or irritating action. After some discussion he consented to my request, provided I would assure him on the subject of Sumter, and he required my authority for my assertion, informing me at the same time that he was satisfied that it was Mr. Seward. I declined to give him any name and told him that he was not authorized to infer that I was acting under any agency; that I was responsible to him for what I told him and that no other person was. I informed him that Judge Nelson was aware of all that I knew and would agree that I was justified in saying to him what I did. I certified

in writing my confident belief that Sumter would be evacuated in five days; that no alteration would be made in the condition of affairs in the Gulf prejudicial to the Confederate States; and that a demand for an answer to his letter to the Secretary would be productive of evil. He preferred to write the letter to Mr. Davis and consented to the requisite delay.

"I informed Mr. Seward of this the same day by letter and of the communication I had made. At the end of five days Mr. Crawford called upon me to know why Sumter had not been evacuated. I requested him to inquire of General Beauregard the condition of affairs at the fort. General B. replied that no indication of an evacuation of the fort had appeared, but, on the contrary, that Major Anderson was at work on the fortifications. I requested Judge Nelson, who was still in Washington, to accompany me to Mr. Seward's office. We found Mr. Seward much occupied, and he could only reply to our question that everything was right, and that he would certainly see us the following day. On the following day we had a free conversation with Mr. S. He spoke of the prospect of maintaining the peace of the country as cheering. Spoke of coercion propositions in the Senate with some acerbity, and said, in reference to the evacuation of Sumter, that the resolution had been passed and its execution committed to the President; that he did not know why it had not been executed; that Mr. L. was 'not a man who regarded the same things important that you or I would, and if he did happen to consider a thing important, it would not for that reason be more likely

to command his attention'; that there was nothing in the delay that affected the integrity of the promise or denoted any intention not to comply. I asked him of the intention as to Pickens. He said the status of Pickens would not be altered. 'You shall know,' he said, 'whenever any contrary purpose is determined on.' I communicated to Commissioner Crawford in writing what was the result of my inquiry, and informed Mr. Seward what I had written.

"My next visit to Mr. Seward was on the 30th of March. On that day Commissioner Crawford brought me a telegram from Governor Pickens of South Carolina, complaining that Colonel Lamon had been permitted to visit Fort Sumter, and that, after doing so, he had promised to return to Charleston in a few days, for the purpose of arranging for its surrender, but that nothing had since been heard from him. Mr. Seward received the telegram and promised to answer me on Monday (April 1st). On the first of April he stated that the President was concerned at the contents of the telegram I had left with him. There was a point of honor involved; that Colonel Lamon did not go to Charleston under any commission or authority from Mr. Lincoln, nor had he any power to pledge him by any promise or assurance; that Mr. Lincoln desired that Governor Pickens should be satisfied of this, and Colonel Lamon was in an adjoining room, and that he would answer any question I would ask him concerning the matter. I declined to see Colonel Lamon, but I inquired of Mr. Seward what I should report upon the subject of the evacuation of Sumter. Mr. Seward

wrote and handed me a writing to the effect 'that the President may desire to supply Fort Sumter, but will not undertake to do so without first giving notice to Governor Pickens.' I asked Mr. Seward, 'What does this mean? Does the President design to attempt to supply Sumter?' He answered: 'No, I think not; it is a very irksome thing to him to evacuate it. His ears are open to every one, and they fill his head with schemes for its supply. I do not think that he will adopt any of them. There is no design to reinforce it.' I then said: 'If there be no formed design to attempt to supply or to reinforce the fort, he should not express a desire to do so. The evacuation is not considered to be an open question in Charleston, and in their State they would regard the expression of a *desire* by the President to supply the fort as evidence of an intention to supply and reinforce it; that this would probably lead to a bombardment; that it was difficult to restrain the people as it was.' Mr. Seward said he must be particular in his intercourse with me, and that he would go to see the President. He left me in his office and was absent some minutes. When he returned, he wrote for the answer to Governor Pickens: 'I am satisfied the Government will not undertake to supply Fort Sumter without giving notice to Governor Pickens.' It was understood between us that the import of the conversations previously had, was not affected by what had taken place.

"During the first week in April it became apparent to persons in Washington City that some important decision in regard to the questions relative

to the seceding States had taken place. The troops which had been collected there were removed; rumors among naval officers of movements of vessels of war were current. There had been an unusual concourse of politicians there, and the tone of one party became more menacing and of the other more anxious and despondent. I recollect to have heard that an expedition for the relief of Sumter had been resolved on, and also threatening speeches of President Lincoln were quoted. Mr. Crawford applied to me for a fulfillment of the pledge for the evacuation of Sumter or for explanations.

"On the 7th of April I addressed Mr. Seward a letter, reciting what had taken place, the anxiety of the Commissioners, and asked explanation. I expressed to him an apprehension that a collision might arise, and suggested a remedy. My communication referred to the condition both of Sumter and Pickens. His reply: 'Faithfully kept as to Sumter, wait and see; other suggestions received and will be respectfully considered.' There was no signature to this note, date, etc. The address was merely on the envelope that enclosed the loose piece of paper on which it was written.

"The Commissioners concluded from this that the expedition fitted out in New York was for Pickens, inasmuch as the note was not replied to in reference to Pickens; and that would be an attempt to supply, but not reinforce, Sumter. They concluded to call for an answer to their letter demanding audience, etc. A reply written on the 15th of March was handed to them. They subsequently exhibited to

me a fierce attack upon Mr. Seward, which they proposed to publish or to send to Montgomery. I objected to their use of Mr. Seward's name. I stated to Mr. Crawford that I had assumed all the responsibility of the intercourse, and had not appeared as the agent for Mr. Seward or to speak at his request, and that I had expressly stated to Mr. Crawford that he was not to infer that I derived information from Mr. S. or any other person in particular. He acquiesced in the accuracy of my statement and expunged the objectionable paragraph. The Commissioners left Washington City during the week, and one of them on his return home misrepresented my relation to this negotiation and endeavored to swell the popular outcry that then existed in the Southern country against me.

"On Thursday, the 11th of April, I was informed that Mr. Lincoln had said that none of the vessels of war that had gone to sea were designated for Sumter; that the expedition to Charleston was designed merely to ascertain whether the South Carolinians would interfere with vessels of the United States employed to relieve famishing soldiers of the United States in one of their own forts. On the same day information was given to me that General Beauregard had summoned Major Anderson to surrender Fort Sumter as a preliminary to reducing it, in the event of a refusal. This information came through a telegram of General B. to the Commissioners, which their secretary exhibited to Mr. Douglas, who had recommended that it be brought to me. I called at Mr. Seward's office and dwelling the same day, but

found him absent. I informed Mr. Frederick Seward of the reported remark of Mr. Lincoln and the danger impending for Fort Sumter, and proposed that I be permitted to communicate to Governor Pickens the matter contained in Mr. Lincoln's statement, expressing the opinion that it would prevent the bombardment. Mr. F. Seward promised to see his father and repeat his answer the same evening to me, but I did not hear from him on the subject. The bombardment of Sumter was commenced the next day and the result was published in Washington City Sunday morning. Before this was known, I addressed a respectful letter to Mr. Seward requesting some explanation of the circumstances which had produced this great calamity. There seemed to be testimony to show that his assurances to me had been continued after the decision to evacuate Sumter (if it ever existed) had been abandoned. To this letter I had no reply.

"The preceding narrative will explain the cause and conditions under which my communications with Mr. Seward and the Commissioners took place. My interposition was voluntary, and my object was to prevent a collision between the seceding States and the United States. My hope was to secure peace and to prevent a civil war. I believed that, in preventing war, a settlement would be made that would satisfy the sober, considerate, and conservative people in all the States, and that no settlement could be made otherwise. I informed Commissioner Crawford that I did not look beyond the securing of peace; that if peace brought defeat to secession, I accepted

that result cheerfully. I desired that the people should have an opportunity to render a calm, intelligent, and undisturbed judgment upon the questions at issue. I had a firm belief in the wisdom of the solution that would be made. I opposed the secession of Alabama openly and publicly. I had no respect for the conceit of a cotton State confederacy, and so declared myself. I condemned in strong terms all that resembled a conspiracy against the union of the States, and took no part whatever in any of the measures that tended to secession or disunion. I had no correspondence with the Montgomery Government, and there was not then, nor has there been at any time since, any great cordiality between the leading members of that Government and myself."

Copies of notes from William H. Seward, Secretary of State, in April, 1861, *without date, filed with Judge Campbell's "statement"*

1. "I am satisfied the Government will not undertake to supply Sumter without giving notice to Governor P." (No signature.)

No. 2. "Confidential.

"Faith as to Sumter fully kept. Wait and see. Other suggestions received with views (?) thanks and high respect."

Envelope endorsed:

"The Honorable J. A. Campbell
"Justice of Supreme Court
"Washington, D.C."

If it is suggested that this is an *ex parte*, "self-serving" statement, the answer is found in the fact

that, on April 13, 1861, Campbell addressed the following letter to Seward, a copy of which he made and preserved:

WASHINGTON CITY, *April* 13, 1861

SIR:

On the 15th March ult. I left with Judge Crawford, one of the Commissioners of the Confederate States, a note in writing to the effect following:

"I feel entire confidence that Fort Sumter will be evacuated in the next five days and this measure is felt as imposing great responsibility on the Administration.

"I feel entire confidence that no measure changing the existing status prejudicially to the Southern Confederate States is at present contemplated.

"I feel entire confidence that an immediate demand for an answer to the communication of the Commissioners will be productive of evil and not of good. I do not believe that it is right at this time to be pressed."

The substance of this statement I communicated to you the same evening by letter.

Five days elapsed and I called with a telegram from General Beauregard to the effect that Sumter was not evacuated, but that Major Anderson was at work making repairs.

The next day, after conversing with you, I communicated to Judge Crawford, in writing, that the failure to evacuate Sumter was not the result of bad faith, but was attributable to causes consistent with the intention to fulfill the engagement, and that, as regards Pickens, I should have notice of any design

to alter the existing status there. Mr. Justice Nelson was present at these conversations, three in number, and I submitted to him each of my written communications to Judge Crawford and informed Judge C. that they had his (Judge Nelson's) sanction. I gave you on the 22d March a substantial copy of the statement I have made on the 15th.

The 20th March arrived, and, at that time, a telegram came from Governor Pickens inquiring concerning Colonel Lamon.

I left that with you and was to have an answer the following Monday (1st April).

On the first of April I received from you the statement in writing: "(I am satisfied) the Government will not undertake to supply Sumter without giving notice to Governor P." The words "I am satisfied" were for me to use as expressive of confidence in the remainder of the declaration. The proposition, as originally prepared was, "The President *may desire* to supply Sumter, but will not do so," etc., etc., and your verbal explanation was that you will not believe any such attempt would be made, and that there was no design to reinforce Sumter.

There was a departure here from the pledges of the previous month, but, with the verbal explanations, I did not consider it a matter then to complain of. I simply stated to you that I had that assurance previously.

On the 7th of April I addressed you a letter on the subject of the alarm that the preparations by the Government had created and asked you if the assurances I have given were well or ill founded.

In respect to Sumter, your reply was, "Faith as to Sumter fully kept. Wait and see."

In the morning's paper I read, "An authorized messenger from President Lincoln informed Governor Pickens and General Beauregard that provisions will be sent to Fort Sumter peaceably or *otherwise by force.*" This was the 8th of April at Charleston, the day following your last assurance, and is the evidence of the full faith I was invited to wait for and see.

In the same paper I read that intercepted dispatches disclose the feat that Mr. Fox, who had been allowed to visit Major Anderson on the pledge that his purpose was pacific, employed his opportunity to devise a plan for supplying the fort by force, and that this plan had been adopted by the Washington Government, and was in process of execution.

My recollection of the date of Mr. Fox's visit carries it to a day in March. I learn that he is a near connection of a member of the Cabinet. My connection with the Commissioners and yourself was superinduced by a conversation with Justice Nelson. He informed me of your strong disposition in favor of peace and that you were oppressed with a demand of the Commissioners of the Confederate States for a reply to their first letter, and that you desired to avoid it, if possible, at that time. I told him I might perhaps be of some service in arranging the difficulty. I came to your office entirely at his request and without the knowledge of either of the Commissioners. Your depression was obvious to both

Judge N. and myself. I was gratified at the character of the counsels you were desirous of pursuing, and much impressed with your observation that a civil war might be prevented by the success of my mediation. You read a letter of Mr. Weed to show how irksome and responsible the withdrawal of the troops from Sumter was — a portion of my communication to Judge Crawford, on the 15th of March, was founded upon one of these remarks, and the pledge to evacuate Sumter is less forcible than the words you employed. Those words were, "Before this letter reaches you" (a proposed letter by me to President Davis) "Sumter will have been evacuated." The Commissioners who received those communications conclude that they have been abused and overreached. The Montgomery Government hold the same opinion. The Commissioners have supposed that my communications were with you, and, upon this hypothesis, propose to arraign you before the country in connection with the President. I placed a peremptory prohibition upon this as being contrary to the terms of my communication with them. I pledged myself to them to communicate information upon what I considered as the best authority, and they were to confide in the ability of myself, aided by Judge Nelson, to determine upon the credibility of my informant. I think no candid man who will read what I have written and consider for a moment what is going on at Sumter but will agree that the equivocating conduct of the Administration, as measured and interpreted in connection with these promises, is the proximate cause of the

great calamity. I have a profound conviction that the telegrams of the 8th of April of General Beauregard and of the 10th of April of General Walker, the Secretary of War, can be referred to nothing else than their belief that there had been systematic duplicity practiced on them through me. It is under an oppressive sense of the weight of this responsibility that I submit to you these things for your explanation.

Very respectfully

JOHN A. CAMPBELL

HON. WM. H. SEWARD
Secretary of State

Receiving no answer to his request, on April 20, 1861, Campbell addressed the following letter to Seward, to which no reply was sent:

WASHINGTON CITY, *April* 20, 1861

SIR:

I enclose you a letter corresponding very nearly with one I addressed you one week ago (April 13th) to which I have not any reply. The letter is simply one of inquiry in reference to facts concerning which I think I am entitled to an explanation. I have not adopted any opinion in reference to them which may not be modified by explanation. Nor have I affirmed, nor do I in this, any conclusion of my own, unfavorably to your integrity in the whole transaction. All that I have said and mean to say is, that an explanation is due from you to myself. I will not say what I shall do in case this request is not complied with, but I am justified in saying that I shall feel at liberty to

place these letters before any person who is entitled to ask an explanation of them.

Very respectfully

JOHN A. CAMPBELL, Associate Justice
Supreme Court of the United States

HON. WM. H. SEWARD
Secretary of State

Judge Campbell, in his statement written at Fort Pulaski, filed with the War Department, and referred to the Attorney-General, July 10, 1865, gave the Administration an opportunity to deny the truth of the "Facts of History" and make an investigation of his conduct and motives between March 15 and April 13, 1861. Mr. Seward was at that time Secretary of State. In that statement Campbell says: "I was opposed to the Act of Secession of the State of Alabama. That opposition was open, public, and declared. The cause for secession was regarded by me as inadequate. My opinions were well known and had the effect to arouse against me hostility and proscription. I was unwearied in the winter of 1861 in efforts to produce a settlement. Through the Honorable Montgomery Blair, I opened a communication with President Lincoln and offered to be the medium of a communication to the people of Alabama. I was consulted by Mr. Crittenden upon his resolutions. I attempted to procure commissioners to be sent to the States to engage them to postpone action; Mr. Buchanan at one time consented to do this. I aided in the consultation of members of the Peace Congress. I endeavored to avert the

calamity of war by preventing military collision. I was a Union man and believed that a few months of peace would save the Union. I have this opinion still. I did not resign to 'aid the Rebellion.' In November, 1860, before the secession of my State, I received a letter from Daniel Chandler, Esq., of Mobile, Alabama, my former partner and brother-in-law, requesting my opinion upon the proposed secession of Alabama. My answer was very full and explicit in condemnation of the measure, and for reasons that were set forth at large. In that letter I stated to him that if the State should secede I would resign my position in the Supreme Court. This letter was not written for publication, and consent to its publication being asked for was withheld, but it was, notwithstanding, published in December, 1860. My belief was firm that the measure of secession would produce war, unless there was a sobriety, moderation, unanimity, and disposition for conciliation and forbearance, which the circumstances then existing forbade me to hope or expect. My relations, friends, and former associates were generally secessionists. I supposed that questions would arise, such as have arisen, that would impose a heavy weight of responsibility upon the Judiciary Department and excite all the passions and powers of the country. I felt that it would be impossible for a person of my relations to obtain the confidence or respect of either section of the country in that position. I supposed that the war would be long, disastrous, and desolating. At this early date, I made up my mind on the subject. My friends spoke of it and wrote of it to me.

Chief Justice Taney, in my last interview with him, 'acquiesced' in the propriety of the step. Mr. Justice Nelson regretted it, but thought that it was natural and proper. I have never understood that my brethren impugned the integrity of my motives. I communicated to Mr. Attorney-General Bates in April, 1861, the necessity of my condition, but pledged myself to him to aid in reëstablishing the Union, if peace could be maintained."

Judge Campbell's statement in regard to his efforts to prevent secession and avert war are sustained by Jeremiah S. Black, of whom it has been truly said that he "reverenced the Constitution, and had a respect for law worthy of a Roman statesman of noblest type. . . . [He was] a man who hated shams and meanness of all sorts, [and was of] absolute and unquestioned purity." [1]

Judge Black says: "When the troubles were at their worst, certain Southern gentlemen, through Judge Campbell of the Supreme Court, requested me to meet Mr. Seward and see if he would not give them some ground on which they could stand with safety, inside the Union. I consented and we met at the State Department. The conference was long and earnest." [2]

That there was no concealment of his conduct by Judge Campbell is shown by a letter from Edwin M. Stanton to James Buchanan, May 19, 1861, in which he writes: "You will see in the New York papers Judge Campbell's report on the negotiations

[1] Rhodes: *History of the United States*, III, 243.
[2] Black: *Speeches and Essays*, 156.

between himself and Mr. Seward, to which I referred in my letter of last week. They had been related to me by the Judge about the time they closed. Mr. Seward's silence will not relieve him from the imputation of deceit and double-dealing in the minds of many, although I cannot believe that it can be justly imputed to him. I have no doubt that he believed Fort Sumter would be evacuated as he stated that it would be. But the war party overruled him with Lincoln, but he could not give up his office. That is a sacrifice no Republican will be apt to make. But this correspondence shows that Mr. Frederick Seward was not in the line of truth when he said that negotiations ceased on the 4th of March. The 'New York Evening Post' is very severe on Judge Campbell, and very unjustly so, for the Judge has been as anxiously and patriotically earnest to preserve the Government as any man in the United States and he has sacrificed more than any other Southern man, rather than yield to the secessionists. I regret the treatment he has received from Mr. Seward and the 'Post.'" [1]

Stanton had, on May 16, 1861, written to Buchanan: "The fling of Mr. F. W. Seward about 'negotiations' would merit a retort if there were an independent press, and the state of the times admitted discussion of such matters. The negotiations carried on by Mr. Seward with the Confederate Commissioners through Judge Campbell and Judge Nelson will, some day, be brought to light, and if

[1] Curtis: *Life of James Buchanan*, II, 549; *New York Evening Post*, May 17, 1861.

they are as represented to me, Mr. Seward and the Lincoln Administration will not be in a position to make sneering observations respecting any negotiation during your administration." [1]

Mr. Rhodes, after careful examination of the "Seward-Campbell Negotiation," refers to Judge Campbell as one "whose sincerity and straightforwardness cannot be questioned." [2]

General Samuel W. Crawford, who examined the letters and documents in the possession of Judge Campbell relating to the negotiation, writes: "Thus ended the voluntary interposition of an official of high position, and whose sole object was to prevent a collision which would have inaugurated war between the States. Like many of his countrymen he believed that, in the preservation of peace, a settlement would be ultimately reached that would satisfy the best and most patriotic minds and to this end he devoted his best energies. He opposed the secession of his State and condemned all that resembled a conspiracy against the union of the States." [3]

At probably more than usual length and with wearying detail, the history of this incident in Judge Campbell's life is given, not for the purpose of inviting or entering into the controversy in which it was charged that Lincoln and Seward were guilty of "equivocation and insincerity with Judge Campbell," or of suggesting that by their conduct they "inaugurated the civil war," but that the "facts of

[1] *New York Evening Post*, May 17, 1861.
[2] Rhodes: *History of the United States*, III, 338.
[3] Crawford, S. W.: *Genesis of the Civil War*, 341.

history" may be made known and Judge Campbell's course understood. There was ample room for the conclusion drawn by Judge Campbell that he had not been dealt with fairly and frankly, and this appears to have been Mr. Stanton's opinion. When attacked by Northern papers, he was entitled to a frank statement from Seward. Probably Mr. Rhodes has reached an approximately correct conclusion. Referring to the charge made by Judge Campbell, Jefferson Davis, and Alexander H. Stephens, that "the equivocating conduct of the Administration" was the "proximate cause" of the commencement of the war in Charleston Harbor, he says: "If, as these gentlemen more or less distinctly assume, the President consented to this negotiation and knew of the assurances which Seward gave, his course cannot successfully be defended. Nicolay and Hay do not tell us in set terms how far he was privy to the quasi-promises of his secretary, but from their narrative it is a reasonable inference that he knew little or nothing about them. Secretary Welles, writing in 1873, says emphatically that the President did not know of Seward's assurance that Fort Sumter would be evacuated, and never gave it his sanction. Considering Lincoln's character and manner of action, nothing but the most positive evidence should convince us that he was in any way a party to this negotiation, and of this there is none. . . . Justice Campbell, believing that Seward was the President in fact, and trusting him implicitly, was the only sufferer on the part of the South." [1] Mr. Schouler is of

[1] Rhodes: *History of the United States*, III, 338, 340.

the opinion that Seward communicated to Lincoln his conversations with Campbell and Nelson.[1]

It is ungracious to differ with Mr. Rhodes; one cannot quarrel with a man so anxious to do justice to all men whether in agreement with them or not, but it is difficult to adopt his conclusion that Mr. Seward was the only diplomat in the Administration in those days. The letters written by Stanton, Holt, and General Dix to Buchanan, during the months of March and April, 1861, tend to sustain the conclusion that the evacuation of Fort Sumter was "common talk," and are interesting in the light of Stanton's subsequent career.[2] Without any disposition to draw into question Mr. Lincoln's conduct or motives, there is evidence from a very respectable source that, at the time Mr. Seward was having conversations with Judge Campbell and Judge Nelson regarding the evacuation of Fort Sumter, the President was also having negotiations with Union men from the South. John Hay recorded in his diary, October 22, 1861, a conversation with Mr. Lincoln, in which the latter said that "he promised a committee of Southern pseudo-Unionists, coming to him before inauguration, to evacuate Sumter if they would break up their Convention without any row or nonsense. They demurred. Subsequently, he renewed the proposition to Summers, but without result. The President was most anxious to prevent bloodshed." Horace White says: "There is reason to believe that Seward had previously prevailed upon

[1] Schouler, James: *History of the United States*, VI, 31, note.
[2] Curtis: *Life of James Buchanan*, II, chap. XXVII.

the President to agree to surrender Fort Sumter as a means of preventing the secession of Virginia." [1] Mr. White suggests that "probably the entry in Hay's diary had been forgotten when the history was written twenty-five years after." [2]

In his "Political History of Secession to the Beginning of Civil War" (page 586) Mr. Daniel Wait Howe ascribes to Judge Campbell a letter of March 6, 1861, written to Robert Toombs, the language of which he quotes. It is impossible to reconcile the authorship of this letter with Judge Campbell's "Facts of History." Mr. Howe's attention being called to the evident mistake promptly wrote that upon investigation he found that "the author of that letter was Martin J. Crawford, one of the Confederate Commissioners, and not Justice Campbell"; that he regretted the mistake "because it does injustice to the memory of Justice Campbell." He attributes the mistake to an error made in "copying extracts from books and documents." The letter, as quoted by Mr. Howe, is printed in Frederic Bancroft's "Life of William H. Seward" (vol. II, page 118), and correctly states that it was written by Crawford to Toombs March 6, 1861, nine days before Judge Campbell met Judge Nelson and, with him, called upon Mr. Seward.[3]

[1] White, Horace: *Life of Lyman Trumbull*, 150. [2] *Ibid.*, 162.

[3] This correction is made at the request and by authority of Mr. Howe. The "mistake" resulted in an interesting correspondence and "a presentation copy" of Mr. Howe's very interesting and informing book. While, as suggested by him, in some aspects our point of view differs, the spirit shown by Mr. Howe is that of a fair-minded, conscientious, and careful student and writer. It gives me pleasure to make this acknowledgment.

John Minor Botts gives an account of a conversation on this subject which, he says, he had with Mr. Lincoln on Sunday, April 7, 1861. He states that on April 5, 1861, Mr. Lincoln had said to John B. Baldwin, a member of the Virginia Convention, then in session, if the Convention would adjourn without passing any ordinance of secession, he would telegraph to New York, "Arrest the sailing of the fleet," and take the responsibility of evacuating Fort Sumter. In 1866 Baldwin testified before the Reconstruction Committee that he had an interview with the President, at the date mentioned, but denied that Lincoln offered to evacuate Fort Sumter if the Virginia Convention would adjourn *sine die*.

It is worthy of note that on April 7, the day on which Botts says he had the conversation with Lincoln, Seward wrote Judge Campbell the note assuring him that faith was kept as to Sumter. In consequence of Baldwin's testimony before the Committee on Reconstruction in regard to this incident, Botts gathered the evidence to sustain his statement.[1]

An interesting side-light is thrown on this incident, about which so many contradictory statements have been published and such strenuous efforts made to misrepresent Judge Campbell, by reference to a paper entitled "Rudolph Schleiden and the Visit to Richmond, April 25, 1861," read by Professor Ralph H. Lutz before the Pacific Coast

[1] Botts, J. M.: *The Great Rebellion*, 194; Report on Reconstruction, 1866.

Branch of the American Historical Association, November 27, 1915. Schleiden was, during the spring of 1861, German Minister Resident at Washington. In confidential dispatches to the Committee of Foreign Affairs of Bremen, he reported that Lincoln had said to the Peace Commissioners in Virginia, when asked to remove the troops from Fort Sumter, "Why not? If you will guarantee to me the State of Virginia, I will remove the troops. A State for a Fort is not bad business." This entire article affords interesting light on the situation, both in Washington and in Richmond, during the month of April, 1861.[1]

That Judge Campbell had the same object in view as had Lincoln and Seward, to prevent bloodshed and avert civil war, is manifest. It is difficult to see why his conduct should not be ascribed to the same motive and judged by the same standard. To do so relieves him of much of the criticism indulged in by Nicolay and Hay in their "History." The incident affords an illustration of the wisdom and justice of Gladstone's rule of life, that "It is always best to take the charitable view, especially in politics," or to accept Cobden's experience which led him to say, "The older I get the more do I believe in men's sincerity."

To have dealt with Judge Campbell in this spirit would have been justice to him, without in any

[1] *American Historical Association Journal*, 1915, p. 209. Thomas L. Clingman, Senator from North Carolina (1861), tells of an interesting conversation (1866) with a member of Lincoln's Cabinet regarding the attitude of the Administration as to the evacuation of Fort Sumter. (*Speeches and Writings*, 564.)

degree lowering the estimate in which the authors wish their readers to hold their hero. Lincoln's place in the estimation of men does not need that those with whom he was associated and from whom he differed should be judged harshly and unjustly.

CHAPTER VI

SERVICES TO THE CONFEDERACY AND PEACE NEGOTIATIONS

FAILING in his efforts to stay secession and avert civil war, and feeling that he had been placed in a false position by what he regarded as Seward's deception, Judge Campbell tendered his resignation to the President. Explaining his reasons for not resigning immediately upon the secession of Alabama, he wrote H. Ballentine, of Mobile, May 22, 1861: "After the adjournment of the term of the Court there was judicial business of importance, but of subordinate importance, to be disposed of; there were objections to my resignation, on principle, from the members of the Supreme Court and from men whose character and counsel merited respect and deference — statesmen from Virginia, Kentucky, Maryland, Tennessee, and North Carolina. And there was every reason to suppose that my holding the office might enable me to contribute something toward securing the great blessing of peace and averting from the country the direst of evils — civil war."

On April 29, 1861, he addressed the following letter to Chief Justice Taney:

MY DEAR SIR:

Some days ago I sent through the mail to the President a notice of my resignation of the office of Associate Justice of the Supreme Court of the

United States. In taking leave of the Court, I should do injustice to my own feelings if I were not to express to you the profound impression that your eminent qualities as a magistrate and jurist have made upon me. I shall never forget the uprightness, fidelity, learning, thought, and labor that have been brought by you to the consideration of the judgments of the Court, or the urbanity, gentleness, kindness, and tolerance that have distinguished your intercourse with the members of the Court and Bar. From your hands I have received all that I could have desired and, in leaving the Court, I carry with me feelings of mingled reverence, affection, and gratitude.

In the prayer that the remainder of your days may be happy and their end peace,

Your friend

JOHN A. CAMPBELL

MR. CH. JUSTICE TANEY

The "National Intelligencer" thus refers to Judge Campbell's resignation: "We regret to announce to our readers that the Honorable John A. Campbell has resigned his appointment as Associate Justice on the Bench of the Supreme Court of the United States. That tribunal loses in him a learned jurist and a faithful Judge, who, during the entire period of his official service, has illustrated the qualities which most adorn the exalted position he was called to fill, and who, in his retirement, will carry with him the admiration of his countrymen and, not least, that of those who may regret the sense of duty

prescribed to himself in tendering his resignation because, as is supposed, of pending political complications."

Mr. Carson says of Judge Campbell's resignation: "This great Judge was commissioned upon the 22d day of March, 1853. In less than eight years he had resigned. It will never cease to be a matter of professional regret that two such Judges as Campbell and Curtis, having once attained such exalted positions, and having displayed such surpassing judicial powers, should have felt themselves called on to retire from membership in a tribunal which they had greatly strengthened and adorned. . . . It takes time to create a great judicial reputation and the fruits of judicial wisdom ripen slowly. Had Marshall or Taney been stricken down in the midst of their career, they would, as Chief Justices, be as little known to the country as Ellsworth and Chase. Or had Washington and Story resigned in middle life, their names would be as little remembered as those of Barbour and Woodbury." [1]

The secession of the Southern States brought radical changes in the lives and careers of many Southern men, some withdrawing from seats in the National Congress; others, impelled by a sense of duty to their political allegiance, resigning positions in the Army and Navy, renouncing well-founded prospects of promotion and lifelong service, or honorable retirement with an assured source of support for themselves and their families. None was called upon to make a greater sacrifice, and few one so

[1] Carson, H. L.: *History of the Supreme Court*, 350.

great, as Judge Campbell. He held, by a life tenure, one of the most honorable public positions in the service of the Government, the duties of which called into daily exercise those mental and moral qualities which, for more than thirty years, he had cultivated by study and practice, with constantly enlarging opportunity and capacity for usefulness; associations in all respects congenial, with prospect of promotion in the membership of the Court. All of these he renounced and returned to private life under conditions most painful and embarrassing. Different from those who looked forward to taking part in the establishment of a new Republic with, as they thought, a successful career in the family of nations, he was strongly attached to the Union and regarded dissolution as unwise and without justification. Upon his resignation he returned to Mobile, where he found that a very strong feeling of hostility to him prevailed among the secession leaders by reason of his publicly avowed opposition to their counsel and the course pursued by them. After settling his private business in Mobile, he formed a partnership for the practice of his profession in New Orleans.

The questions occur, Why, with his opinion in regard to the secession of Alabama and the organization of a Southern Confederacy, did he resign and return and give his adherence and support to the Confederacy? Was he, in pursuing this course, loyal to his allegiance and his duty to the country? These questions are pertinent and call for an answer. Whether he correctly construed the Con-

stitution, in holding to the opinion that the State of Alabama, and those other States which pursued the same course, exercised a reserved political right and, by the ordinance of secession, separated themselves from the Union and became independent sovereign States, is a question in regard to which patriotic, loyal men had, at all times, honestly differed. Those Southern men who believed that secession was not only the right, but in the condition by which they were confronted the duty, of the Southern States found no difficulty in giving their active support to the Southern Confederacy. The question which Southern men of Judge Campbell's school of thought and political faith and views as to the wisdom of secession were called upon to answer, was open to debate. In fixing the place of these men in the estimation of the present and future generations, it may be appropriately asked, Why, if they thought no valid or sufficient cause existed justifying secession, did they acquiesce in the action of the States and continue to give their allegiance to them after they had adopted ordinances of secession? It may be frankly conceded that, in those days of uncertainty and doubt, there was an absence of uniformity and consistency in the course pursued by men of undoubted patriotism and moral and political integrity. Many men in the North, who denied the right of a State to secede from the Union, insisted that there was no power in the National Government to use forcible means to prevent it from doing so. Others, without undertaking to decide the question of the right to secede, held that for the United States to hold a

State to its allegiance by coercion would be nothing short of subjugation and destructive of the purpose for which the Union was formed. So, in the South, many denied the right of secession, but found justification in the exercise of the right existing in all political communities to make a revolution and sever their political relations. This doctrine they found taught, and this right successfully asserted, by the colonists of 1776 from whom they were descended.

Judge Campbell, with many others, probably a majority of Southern men, held to the opinion that there existed in each American State the reserved, inalienable right to sever its relation to the United States whenever its safety and welfare demanded, and of this the people of each State were the final judges. As we have seen, this opinion, formed upon long and diligent study of the Constitution and history of the country, he had held and publicly expressed long before the occasion for its exercise arose. He logically concluded that when the State of Alabama exercised this right, as one of her citizens he owed allegiance to her and, as he expressed it, must follow the fortunes of her people. The basic principle upon which this conclusion depended was that he was a citizen of the State and that his ultimate allegiance was due to her.

In his argument before the Supreme Court in the Slaughter-House Cases, after the restoration of the Union and the adoption of the Fourteenth Amendment, he expressed his views, saying: "It had been maintained from the origin of the Constitution, by men in every part of the United States and of the

highest order of ability, and who exerted great influence, that the State was the highest political organization in the United States, and through the consent of the separate States the Union had been formed for limited purposes, and that there was no social union except by and through the consent of the separate States, and that in extreme cases the several States might cancel the obligations to the Union and reclaim the allegiance and fidelity of its members. . . . That a confederation did not destroy sovereignty or independence. That she bound herself only by the ratification and reserved all the powers not therein given to the General Government. . . . There is no definition of what constitutes a citizen, nor how a native becomes a citizen. . . . The Fourteenth Constitutional Amendment was designated to enlarge and to determine the relations of citizens and to place their obligations beyond dispute." [1]

It followed with inexorable logic, from this proposition, that when the State of Alabama adopted the ordinance of secession, Judge Campbell must either sever his political relation to the State and become a citizen of another which had not adopted such an ordinance, or resign his office; hence he says: "After using every effort in my power to secure peace and prevent war, when it became evident that I could do no more, I resigned, as a consequence of the secession of the State of Alabama." His associate, Judge Wayne, a citizen of Georgia, holding the view that her ordinance of secession was unauthorized and void, working no change in the relation of the State

[1] Brief in Slaughter-House Cases.

to the Union, remained on the Bench. Both acted in accordance with, and followed, the logical conclusion to which their opinions led.

Men of this generation find it difficult to understand and appreciate the trials of mind which those of the pre-civil war period underwent. During the war and for many years afterwards, it was the fashion to refer to those who followed their States as "traitors" and to their conduct as "treason." These terms, incorporated into the language of legislation, judicial decisions, and the literature of those days, crystallized this conception of the conduct of Southern men. To those to whom these men and their motives were known and to whom the political history of this country is familiar, it has been a source of astonishment that such terms should have ever been applied to them or their conduct, and it is gratifying to note that, with the passing of the passions and the coming of a clearer vision, with conciliation and growth of National unity, many men of Northern birth and sympathies are inclined to give expression to more generous and, therefore, more just views. Charles Francis Adams clearly states the attitude of men who had been educated in the school of thought to which Judge Campbell belonged. He says they held that "ultimate allegiance was due to the State which defined and conferred citizenship, not to the central organization which accepted as citizens whomsoever a State pronounced to be such." [1] The

[1] Adams, Charles Francis: *Trans-Atlantic Historical Solidarity*, 46; *Lee's Centennial;* Bradford, Gamaliel: *Lee, the American*, 25; Munford: *Virginia's Attitude Toward Slavery and Secession*, 290.

question has been so thoroughly "threshed out" that it would seem impossible for any new light to be thrown upon it. George Bancroft happily expressed the sentiment of the men who outlived the passions of the Civil War. In 1874, Dr. S. Weir Mitchell, Senator Bayard, Senator Sherman, General Sherman, and several other gentlemen were dining with Mr. Bancroft, when General Sherman, referring to some incidents of the war, spoke of the Southerners as "rebels, who may have also confederated," whereupon Mr. Bancroft said: "Fill your glasses, gentlemen; let us drink to the memory of dead Confederates, who are no longer Rebels." Turning to Dr. Mitchell, he said: "After all, Doctor, it was a civil war and it is time to begin to be charitable in the use of labels." [1]

Without regard to the result of the war, measured by the standard of loyal devotion to an intellectual and moral conviction of political duty Judge Campbell is justly entitled to the judgment pronounced by George Ticknor Curtis upon his conduct. He said: "This is an appropriate occasion to speak of the quality of that patriotism which led pure and honorable men, like Judge Campbell, and hosts of others in civil and military life, to devote their energies and to stake their lives, after the great issue was made up, in an effort to establish a country for themselves and their posterity. Patriotism then became, to such men, a duty to the land of their birth and their affections. In the moral estimate which history should form of their conduct, it should be remem-

[1] Howe, M. A. de W.: *Life and Letters of George Bancroft*, II, 280.

bered that events, sweeping on with irresistible force, had compelled such men to make a choice between adhesion to the Federal Government and adhesion to the separate and independent government which the Southern people wished to make." [1]

Judge Campbell took no part in the war nor held any position under the Confederate Government until, during the month of October, 1862, George W. Randolph, Secretary of War, applied to him to accept the position of Assistant Secretary of War, stating that there was in the War Department a large accumulation of business of a civil nature requiring the attention of an experienced lawyer. It is probable that, in addition to Judge Campbell's reputation as a lawyer, the Secretary was influenced in calling him to his aid by the fact that he had received training at the United States Military Academy at West Point. Although Mr. Randolph recognized that the position was not in keeping with the character and qualifications of Judge Campbell, he urged his acceptance because of the aid which he was capable of rendering.

Judge Campbell says: "This application was without any agency on my part. . . . The country was then suffering all the calamities of invasion. Much of the business and the feelings and sensibilities of the country were concentered in the War Office, for conscription had placed the whole military population under it, and impressments were doing the same in regard to property. The courts were debilitated. Military rule dominant. The office

[1] *Memorial Addresses — Justice Campbell*, 23.

of Assistant Secretary did not give to me any control over military operations or organizations. It did not charge me with the subsistence, movement, or employment of troops; or with the conduct of the war. It gave me no control, custody, oversight, care, or responsibility in regard to prisoners of war. I had no charge of regular or irregular enterprises of war, or of any secret service or the employment of money. I decided a vast number of cases for the exemption of citizens from military service. I made details in cases of justice, equity, and necessity, and granted exemptions on that account, on appeal from the subordinate officers. I revised a vast number of cases of arrests by subordinates. I superintended the current correspondence of the office. I made a great variety of orders and decisions in particular cases. The office was one that imposed irksome, uncongenial, and, in most cases, trivial labor. But I do not doubt that I alleviated much distress, mitigated the severities of the war to some persons, enforced justice and order in many instances, and won the respect of those having connection with the office, by a firm, impartial, and benevolent administration. I applied to resign in 1863. I resigned in 1865. At each time I was assured that my services could not be dispensed with, and at the last time nearly all the Congressmen made an appeal to me to remain. I have no belief that I made any impression upon the great events of the war; or any upon the policy of the Government. All I mean to say is that, under the difficult circumstances of the time, in a subordinate and comparatively unimportant office, I found the means to do a

great deal of good. I diminished the weight of the heaviest calamity that ever befell a country, to many; I have no reason to believe that I aggravated them to any one person. This is my consolation for loss of exalted position, competent fortune, and my present captivity. One motive for accepting this office was that I might have some influence in promoting peace. A position of isolation is one without influence or usefulness. The legislative and executive action of the United States in 1862 undoubtedly prolonged the war and made peace more difficult. The war seemed to change its character and objects during that year, and to become more exasperated and intense. I was in favor of peace, if one could be made, upon the basis of a reunion of the States at any time after my resignation. The abrupt and forcible emancipation of slaves made a new condition which the people of the Southern States regarded with apprehension and abhorrence. After that legislation it became apparent that peace was to result only from the exhaustion of the Confederate States. In the fall of 1864 I brought the matter to the notice of the Secretary of War. I exposed the situation of the Treasury and the error in the report of its chief. I brought to the notice of members of Congress the condition of things and urged upon them to take measures for negotiation. In December, 1864, I addressed Mr. Justice Nelson an elaborate letter inviting a conference with him, and if possible Messrs. Ewing, of Ohio, Curtis, of Boston, and Secretary Stanton, to ascertain whether measures for peace could not be set on foot. Two copies of this letter,

with the concurrence and sanction of Messrs. Hunter and Seddon, were sent in December, but no answer was received."

Like many other Southern men, Judge Campbell became convinced, during the winter of 1864, that the military and financial resources of the Confederacy were inadequate to a continued and successful contest. In order to forestall the consequences of what he foresaw would be certain and disastrous defeat, he thought that some effort should be made to secure peace on the best terms which could be obtained by negotiation. By reason of his position, as Assistant Secretary of War, he was enabled to know of the constant depletion of the resources of the Confederacy. His relations with Judge Nelson, while on the Bench, were very intimate, and he knew of the latter's conservatism and patriotism. Accordingly, on December 1, 1864, he addressed to him the following letter:

My dear Sir:

It has more than once occurred to me, since my intercourse with you was suspended by the existing war, to address you with a purpose of ascertaining whether anything could be effected for the amelioration of the condition which it has occasioned. There were practical difficulties that were not easily to be overcome. I had no assurance that any good would follow from it. It might expose you, as well as myself, to misconstruction; and events seemed to be so little under the control of any private and individual will or action that a submission to them was all

which was apparently left for any one having no particular control. An intelligent and reverend friend who lately came through the United States, passing by the headquarters of two of their armies, informs me that one of their commanders expressed to him the opinion that good might follow from a frank and candid interchange of opinions and information between citizens of the different sections and that, so far from opposing obstructions, he would grant facilities for that kind of intercourse. This observation was a general one, and of course had no relation to you or to myself. It was repeated to me as seriously, sincerely made, and one upon which some notice or action might be taken. It has had the influence to induce me to address you this letter. My opinions and feelings as to the manner proper to compose the existing difficulties have undergone no change since the day we parted in Washington in 1861. My conviction is firm and abiding, greatly fortified by what I know, that had the counsels which you gave on that day been followed, in the fullness of their spirit, and even to their letter, the country would have escaped the heaviest calamities that have since befallen it. I believe now that an honorable peace will relieve the country from evils, possibly more permanent and more aggravated than those which have been suffered. Nor have I, at any time, hesitated to believe that wise, moderate, magnanimous counsels might result in an honorable peace. I can say to you now, what I expressed then, that the consequences of such a peace I was ready to accept. I believe that from it all that a good or wise

man ought to desire would surely, and in good time, appointed by Providence, result. If you suppose that any advancement to this end would be made by any communication between us, or between myself and others, I am ready to hold that communication. Mr. Ewing, Judge Curtis, or Mr. Stanton, have occurred to me in this connection. I should not bear any official commission nor have any proposition from any public authority. My object is simply to promote an interchange of views and opinions which might be productive of good and scarcely do harm. I would meet you in the U. S., or at any point beyond the Confederate lines which might be designated. For this a passport would be necessary. If you would prefer it, some time to visit Richmond, upon informing me, I would acquaint you whether it can be done. This letter is not marked private or confidential. I am well aware of the fact that it will be proper to communicate it to other persons. Of course it is not my wish that any undue publicity should be given it.

Very respectfully and truly yours

J. A. Campbell

On the back of the copy of this letter, retained by Judge Campbell, he made the following endorsement:

My letter was sent to Justice Nelson in December, 1864, through the secret signal service of the Confederate States. Two copies were sent and both received by Judge Nelson in the winter of 1864–5. He exhibited them to Mr. Stanton, who said that it was the most satisfactory of all that had been suggested.

He stated that the President (Lincoln) had initiated a scheme, and that Mr. Frank Blair was charged with it. Mr. Blair was in Richmond and nothing could be done till that plan had been tried. Mr. Secretary Seddon and Mr. Hunter read this letter. Mr. Davis was informed of it by Mr. Seddon and consented that this attempt should be made.

It will be observed from the endorsement on the letter that Mr. Blair had gone to Richmond upon the errand which preceded the Hampton Roads Conference. What effect the letter had on President Lincoln's mind in connection with the Conference is, of course, conjectural. The history of the events preceding the Hampton Roads Conference are too well known to require repetition. The first occasion on which Judge Campbell's name is mentioned in connection with it is found in Blair's account of his visit to President Davis in Richmond. He says that President Davis said that "he would appoint a person or persons who could be implicitly relied on by Mr. Lincoln; that he had on a former occasion indicated Judge Campbell, of the Supreme Court, as a person who could be relied on. I told him he was a person in whom I had unbounded confidence, both as regarded talents and fidelity." [1]

The "Memorandum" of the Hampton Roads Conference, prepared by Judge Campbell at the request of Alexander H. Stephens and R. M. T. Hunter, the other Commissioners, contains a full account of what had been published concerning the

[1] Nicolay and Hay: *Abraham Lincoln*, x, 106.

conversations between Lincoln, Seward, and the Confederate Commissioners.[1] It has been stated, and frequently repeated, that in this conversation Lincoln said to the Commissioners: "Let me write Union and you can write anything else you want," and that he proposed, if the Southern States would abolish slavery, disband their armies, cease resistance to the National authority, he would recommend to Congress that the owners be paid $400,000,000 as compensation for their slaves. But for the insistency with which this statement has been made and repeated, and the character of some of those who have given it their endorsements, it would seem unnecessary to take notice of it. The fact that those who were present and engaged in the Conference made records, more or less official, of what passed between Lincoln and the Commissioners, in no one of which is there any suggestion of such language, renders it improbable that it was used. No notes were made of the conversation at the time, and there was an agreement that no record was to be made. Reports were made by Lincoln and by the Confederate Commissioners to their respective Governments.[2] It is unthinkable that either or all of them would have failed to mention the proposition if it had been made. The interest attaching to the assertion that Lincoln made such an offer consists in the reflection upon the Confederate Commissioners for omitting any reference to it. Each of the Commissioners desired to bring about a settlement,

[1] *Southern Historical Society Papers*, III, 168.
[2] Richardson: *Messages and Papers of the Presidents*, VI, 260.

and was willing to do so by the return to the Union of the seceded States; each recognized that peace could not be secured upon any other terms; each had become convinced that the Confederacy was not able successfully to maintain the struggle for its separate existence; and each well knew that such propositions, or any of them, would strongly appeal to large numbers of the Southern people. Passing, therefore, the element of bad faith involved in the charge that they suppressed the truth, and resorting to the argument based upon the reason of the thing, it is impossible to believe that they prevented the consummation of the very purpose which they so much desired by suppressing propositions which would almost certainly have accomplished it. The charge has been thoroughly examined, its origin and source, with its repetitions, and the evidence carefully collated by General Julian S. Carr, of Durham, North Carolina.[1]

Some years after the war, in an interview Judge Campbell gave his recollection of what was said upon this subject, saying: "In a conversation with Mr. Lincoln I asked him whether, if the South laid down its arms and accepted the Union again, the people would have any chance to receive compensation for their slaves. To this Mr. Lincoln replied that he could not promise what the attitude of the Government might be on the subject, but for himself he would heartily favor a compensation on the ground

[1] *The Hampton Roads Conference.* See also Fitzhugh Lee's "Failure of the Hampton Roads Conference," *Century Magazine* (July, 1896), LII, 476.

that the North was as responsible for slavery as the South and had abetted in it, traded in it, and defended it until slavery became a vast, public question and invited war."

While the evidence is overwhelmingly against the suggestion that Mr. Lincoln made any of the propositions to the Commissioners, it is not improbable that there is foundation for the belief that, with the acceptance of the basic propositions, namely, return to the Union, disbanding of the Confederate armies, and acceptance of the emancipation of the slaves, undefined suggestions looking to adjustments and amnesties were made. General Grant writes that "not a great while after the Conference" Mr. Lincoln visited him at City Point. "He spoke of having met the Commissioners and said that he had told them that there would be no use in entering into negotiations unless they would recognize, first, that the Union, as a whole, must be forever preserved, and second, that slavery must be abolished. If they were willing to concede these two points, then he was ready to enter into negotiations and was almost willing to hand them a blank sheet of paper with his signature attached, for them to fill in the terms upon which they were willing to live with us in the Union and be one people." [1] This was written twenty years after the conversation with Mr. Lincoln, but it is probably a fairly accurate account of what he said. It will be noted that Grant does not state that Mr. Lincoln said that he made this proposition to the Commissioners, but that, as

[1] Grant, U. S.: *Personal Memoirs*, II, 422.

a prerequisite to any negotiations, the Commissioners were to recognize that the Union was to be preserved and slavery abolished, and if they agreed to those points, then Mr. Lincoln had a certain disposition which he indicated to Grant, but he does not say that he indicated it to the Commissioners. There is abundant evidence that Mr. Lincoln favored indemnifying the Southern people for the slaves and that the figure $400,000,000 was in his mind.

Among the papers of William Pitt Fessenden, Secretary of the Treasury in 1865, was found the following:

"A summons to a Cabinet meeting on the engraved form used for that purpose.

"DEPARTMENT OF STATE
"WASHINGTON, *February* 5, 1865

"SIR:

"The President desires a meeting of the Heads of Departments at the Executive Mansion at 7 o'clock this evening.

"F. W. SEWARD, Ass't. Sec'ty."

Senator Fessenden returned from the meeting and endorsed the invitation:

"A proposition to offer the Confederate and other slave States 400 millions of dollars, to be divided among them according to the census of 1860, and a general amnesty, provided they disbanded before April 1st, 200 million to be paid then and the other 200 million on July 1st, if the Constitutional Amendment be then adopted." [1]

[1] Fessenden, Francis: *The Life and Public Services of William Pitt Fessenden*, II, 7.

It will be noted that this meeting occurred two days after the Conference. The Cabinet opposed submitting the proposition to Congress.

It is also significant that in Judge Campbell's "Memorandum," drawn up at the request of, and approved by, his associates, while the fundamental conditions upon which peace could be secured are stated clearly, there runs through the language used the suggestion that terms of adjustment were left open and that the statement made by Senator Hunter that Mr. Lincoln demanded "unconditional submission" was promptly repudiated. Judge Campbell's questions indicate that he was seeking information in respect to practical plans for settling the questions which would arise upon the reconstruction of the Union. Mr. Lincoln had in his mind "indemnities to the masters of slaves."

In a letter to J. M. Mason, June 11, 1870, Jefferson Davis writes: "Mr. Hunter promised me that he would write a full account of the sayings and doings of the Commission which met Lincoln and Seward at Hampton Roads. I have not thought it well to write him while he was subject to military and Underwood authority." He further writes: "They agreed with Lincoln and Seward that they would regard their conversations as confidential. The report when they came back was, therefore, to a great extent, oral; the written report so meager as not to furnish, as it seemed to me, what was needful to a fair comprehension of their failure and the reasons for it. I urged, seriously, that a fuller report should be made." Mr. Davis refers to what Hunter told

him, and this Mr. Davis regarded as a "surrender at discretion." This letter, General Fitzhugh Lee says, Mason sent to Hunter, who, on September 19, 1870, wrote Mason, saying: "I have read Davis's letter which you enclosed, and regret that I did not write out minutely my recollections of what passed at the Hampton Roads Conference whilst they were fresh in my mind. But I was imprisoned soon after the war, and my papers were either seized or dispersed, and since my release I have been engaged in hard work for a livelihood." He says that he had examined Stephens's account of the Conference published in the "Eclectic Review," and it seemed to him very fair "and from which I do not much differ, except as to the report of Seward's conversation on slavery. . . . I know that in our opinion no settlement was possible except upon the condition of abolishing slavery and returning to the Union. But there was a question beyond that. Supposing these things to be inevitable, as they then seemed to be, was it not worth the effort to save as much as possible from the wreck? Upon this Mr. Davis and I differed. I thought the effort ought to be made, but I saw then, and see it still more plainly now, that there might be two sides to that question."[1]

Judge Campbell wrote to Hunter, October 31, 1877, that he concurred with his recollection as to what occurred at the Conference. The frequent references made by Alexander H. Stephens in the "Recollections," being his journal kept while im-

[1] Lee, Fitzhugh: "Failure of the Hampton Roads Conference," *Century Magazine* (July, 1896), LII, 476.

prisoned at Fort Warren, indicate that something was said to the Commissioners at Hampton Roads by Mr. Lincoln which he did not feel at liberty to make public. Stephens was greatly distressed by the publication of an article in the "Chronicle and Sentinel" of Augusta, Georgia, purporting to contain his version of what was said at the Conference. He says: "The reasons I am reported to have assigned for not making public what Mr. Lincoln said about compensation for emancipated slaves, is not accurately put; nor is what Mr. Lincoln said on that subject." [1]

In his letter to Seward he wrote: "I have made no report for the public but that which was joint with the other Commissioners and which was published in the Richmond papers. Upon the main points in that Conference, those upon which it was sought, I have never, even in private, made any statement that could reach the public. For great public reasons, I abstained from it.[2] Stephens later gave his version of the Conference." [3]

Judge Campbell concurred with Hunter and Stephens in thinking that Mr. Lincoln's proposition should have been made the basis of further negotiation. Mr. Davis did not concur with them. On July 10, 1865, Judge Campbell wrote: "I acted as one of the Commissioners at the Conference in Hampton Roads and evinced earnest disposition to make peace at that Conference. I refused to participate in the meeting to influence the people on my return

[1] *Recollections*, 281. [2] *Ibid.*, 373.
[3] *The War Between the States*, chap. XXIII.

from that Conference. I urged the appointment of a Commission for the purpose of entering into negotiations upon the basis of Mr. Lincoln's propositions. I addressed, at the request of Governor Graham, of North Carolina, a letter to him explaining Mr. Lincoln's views, how they would leave the Confederate States and urging the effort to accept the terms he held out."

Judge Campbell reviews the condition of the Army and the Treasury, concluding: "It is the province of statesmanship to consider these things. The South may succumb, but it is not necessary that she should be destroyed. I do not regard reconstruction as involving destruction, unless our people should forget the incidents of their heroic struggle and become debased and degraded. It is the duty of their statesmen and patriots to guard them in the future with even more care and tenderness than they have done in the past. There is anarchy in the opinions of men here, and few are willing to incur the responsibility of taking or advising action. In these circumstances, I have surveyed the whole ground, I believe calmly and dispassionately. The picture I do not think has been too highly colored. I do not ask that my views be accepted, but that a candid inquiry be made with a view to action. I recommend that General Lee be requested to give his opinion upon the condition of the country, upon the submission of these facts, and that the President submit the subject to the Senate, or to Congress, and invite their action."

As the result of this letter and the action taken by

the Secretary of War, the information derived from the heads of the Departments and from General Lee, a communication enclosing the reports was submitted to Congress, March 14, 1865. A resolution was prepared by W. C. Rives, reciting the conditions, declaring that a longer prosecution of the war with any reasonable prospect of success was impracticable, and advising the President to propose an armistice preliminary to the reëstablishment of peace and Union, "and for the special purpose of settling and ascertaining certain points incident thereto, to restoration of the Union, and particularly whether the seceded States, on their return, will be secured in their rights and privileges as States under the Constitution of the United States."

This resolution was handed by Judge Campbell to William A. Graham, Senator from North Carolina, to be offered in the Senate. Graham concurred in its recitals and in the advice to the President and the necessity for prompt action. He submitted it to a number of Senators who said that, if passed, no action would be taken and nothing could be done. Graham, therefore, returned it to Judge Campbell. William A. Graham, a man of singular purity of life, loftiness of purpose, and sanity of mind, in a letter to Mrs. Graham, February 26, 1865, writes: "I have had several confidential conversations with Judge Campbell, who is the most judicious man connected with the Government."

CHAPTER VII

THE PROBLEM OF RESTORATION

The evacuation of Richmond, April 2, 1865, brought Judge Campbell's official career to an end and closed another chapter in his life. He knew perfectly well that General Lee could not longer continue the struggle, and that the surrender of his army and the downfall of the Confederacy were imminent. Referring to his efforts to secure negotiation, he says: "All these efforts being abortive, I could only await the ruin certain to arrive. I wrote to Governor Fitzpatrick of Alabama, of date 9th March, '65, telling him that Richmond would be evacuated, General Lee's army disbanded or surrendered, and the Confederate cause destroyed, and to take measures for the restoration of Alabama to the Union. I determined to remain in Richmond when evacuation should occur and to renew my obligations to the United States."

Judge Campbell now made his last effort to serve the South as a peacemaker. Probably there is no office which a man can undertake, so far as the appreciation of those whom he attempts to serve is concerned, which subjects him to more criticism and brings him less compensation than that of a mediator. It is very doubtful whether any statesman has advanced his reputation or strengthened his hold upon popular favor by efforts to secure peace between warring factions or belligerent nations. It

is equally doubtful whether so high and valuable a service is rendered in any other capacity. While Judge Campbell's efforts to promote peace were prompted by the highest motive and the most patriotic purpose, they subjected him to misunderstanding, misconstruction, and misrepresentation.

In view of the distorted accounts of his conversations with Mr. Lincoln in Richmond, and his conduct based upon his letters of April 6 and 7, 1865, a recital of the principal facts connected with this incident in his career is necessary. In his account of the manner in which he was brought into conversation with Mr. Lincoln and the subsequent course pursued by him, he says that after the entry of the Federal army into Richmond, he called upon General Shepley, Military Governor, who informed him that Mr. Lincoln was then at City Point. To the suggestion of Judge Campbell that he would be pleased to meet the President, the General said that he would see General Weitzel, in command of the army of occupation, and if he consented would telegraph him. Mr. Lincoln came to the city that afternoon, going to the house recently occupied by Mr. Davis. Judge Campbell says: "Shortly after his arrival a staff officer came for me and I was conducted to a small room in that building, where I met President Lincoln and General Weitzel. . . . His manner indicated that he expected some special and, perhaps, authorized communication to him from the Confederate Government. I disabused his mind of this by saying that I had no commission to see him. . . . I then told Mr. Lincoln that the war was over, and all that

remained to be done was to compose the country. . . . I spoke to him particularly for Virginia, and urged him to consult and counsel with her public men and her citizens as to the restoration of peace, civil order, and the renewal of her relations as a member of the Union. I urged that, although there had been passion, petulance, and animosity in the secession movements, there were also serious differences of opinion as to constitutional obligations and responsibilities, upon which there was a ground for opposing opinions. I informed him that efforts for peace had been made during the winter and that the most prominent men of the State were ready to aid in the work of pacification, and that if he would call them together the work would be nearly done; that 'when leniency and cruelty play for the conquest of a kingdom, the gentlest player will be the soonest winner.' Mr. Lincoln asked me to whom I alluded in asking him to take counsel with the public men of Virginia. I mentioned, among others, Mr. Rives, Mr. Hunter, Governor Letcher, Mr. Baldwin, Mr. Caperton, Mr. Holcombe, and General Lee himself. Mr. Lincoln, at the end, answered that my general principles were right; the trouble was how to apply them; that he was impressed with what I had said of the difficulty of finding any one willing to deal with the subject of peace. He said that he 'wanted to have another talk,' and, for that purpose, would remain in Richmond that night. . . . It was agreed that I should visit him on the gunboat (Malvern) on which he had come to Richmond from City Point, and that I might bring with me citizens

of the place. I sent invitations to several, but most of them were absentees, others declined to go with me."

On the following day, accompanied by Gustavus Myers, a member of the Richmond Bar, Judge Campbell went to see the President. He says: "The President was prepared for the visit and spoke with freedom and apparent decision. . . . In the course of the conversation, he produced a paper written by himself, but not signed nor addressed to any one. This paper he read over, and then commented upon each clause at some length and handed the paper to me. I did not perceive any material difference between the terms expressed in this paper and those announced by the President at Hampton Roads. . . . My answer to the President was that I did not believe that there would be any opposition to his terms. . . . Mr. Lincoln told me that he had been meditating a plan, but that he had not fixed upon it, and if he adopted it, would write to General Weitzel from City Point. This was to call the Virginia Legislature together, 'the very Legislature which had been sitting up yonder,' pointing to the Capitol, 'to vote the restoration of Virginia to the Union.' He said he had a government in Virginia — the Pierpont Government — but it 'had a very small margin,' and he was not 'disposed to increase it.'"

After some inquiries addressed to Mr. Myers, relative to the composition of the Legislature, they parted with him with expressions of mutual goodwill. The next day, April 6, 1865, Mr. Lincoln sent

General Weitzel the following letter: "It has been intimated to me that the gentlemen who have acted as the Legislature of Virginia, in support of the rebellion, may now desire to assemble at Richmond, and take measures to withdraw the Virginia troops and other support, from resistance to the General Government. If they attempt it, give them permission and protection until, if at all, they attempt some action hostile to the United States, in which case you will notify them, give them reasonable time to leave, and at the end of which time arrest any who remain. Allow Judge Campbell to see this, but do not make it public."

In accordance with the interpretation placed upon the letter by Judge Campbell, on April 7, 1865, he addressed a letter to General Joseph R. Anderson and others, as a Committee, setting out the substance of Mr. Lincoln's terms contained in the "Memorandum" given him, and the conversations with him. The members of the Legislature then in Richmond promptly met, and with the approval of General Weitzel, issued an "Address to the People of Virginia."

But on April 12, Mr. Lincoln addressed a letter to General Weitzel, withdrawing his consent for the Legislature to assemble. Senator R. M. T. Hunter went to Richmond to meet the Legislature, but was ordered to leave within twenty-four hours. Judge Campbell, together with Mr. Hunter, proposed to General Ord, who had relieved General Weitzel, to go to see Mr. Lincoln. A telegram was sent on April 14, 1865, to Washington, asking permission to go.

No answer was received. That night Mr. Lincoln was assassinated.

The "Memorandum" handed to Judge Campbell by Mr. Lincoln was as follows:

"As to peace, I have said before, and now repeat, that three things are indispensable:

"1. The restoration of the National authority throughout the United States.

"2. No receding by the Executive of the United States on the slavery question from the position assumed thereon in the late annual message, and in preceding documents.

"3. No cessation of hostilities short of an end of the war, and the disbanding of all forces hostile to the Government. That all propositions coming from those now in hostility to the Government, not inconsistent with the foregoing, will be respectfully considered and passed upon in a spirit of sincere liberality.

"I now add that it seems useless for me to be more specific with those who will not say that they are ready for the indispensable terms, even on conditions to be named by themselves. If there be any who are ready for these indispensable terms, on any conditions whatever, let them say so, and state their conditions, so that the conditions can be known and considered. It is further added, that the remission of confiscation being within the executive power, if the war be now further persisted in by those opposing the Government, the making of confiscated property at the least to bear the additional cost will be insisted on, but that *confiscations* (except in case of third party intervening interests) *will*

be remitted to the people of any State which shall now promptly and in good faith withdraw its troops from further resistance to the Government. What is now said as to the remission of confiscation has no reference to supposed property in slaves."

Thus ended in failure the last effort made by Judge Campbell as a mediator and to promote peace. As this transaction has a relation to subsequent events of larger significance, a full account of the conduct of all who were concerned in it is important and of interest.

It will be well to keep in mind the order in which these events occurred. Mr. Lincoln came to Richmond and had the first conversation with Judge Campbell, in the presence of General Weitzel, on April 4, 1865. On April 5 the second conversation took place when Mr. Lincoln gave Judge Campbell the "Memorandum" which Mr. Lincoln read over and commented upon. On April 6, 1865, Mr. Lincoln sent to General Weitzel the letter which he directed to be shown to Judge Campbell. Acting upon the "Memorandum" and the letter, as interpreted by him, by General Weitzel, and by General Shepley, Judge Campbell, on April 7, prepared the letter to General Joseph R. Anderson and other citizens. On April 11, 1865, Judge Campbell prepared and submitted to General Weitzel the "Address to the People of Virginia." Upon this "Address" General Weitzel wrote the words, "Approved for publication in the 'Whig' and in handbill form. G. Weitzel, Major General Commanding." Judge Campbell's letter and the "Address" were inspected and revised

by General Shepley, the Military Governor, and General Weitzel, and examined by Charles A. Dana, Assistant Secretary of War, then in Richmond.[1]

General Lee surrendered April 9, 1865. Mr. Lincoln returned to Washington on the evening of that day. He addressed a meeting of the people at the White House on Tuesday night, April 11, in which he said that he had prepared a plan for the inauguration of the National authority and reconstruction in 1863, which would be acceptable to the Executive Department, and that it was approved by every member of the Cabinet; but he was now censured for his agency in setting up and seeking to sustain the State Governments, though the Executive claimed no right to say when or whether members should be admitted to seats in Congress. Mr. Welles says that at the Cabinet meeting on Tuesday, the proclamation or order of General Weitzel was discussed very fully. It caused surprise and, on the part of some, dissatisfaction and irritation. "Stanton and Speed were particularly disturbed." Mr. Lincoln was surprised that his object and the movement were so generally misunderstood, and said that, under the circumstances, perhaps, it would be best that the proceeding should be abandoned; that he could not go on with every one opposed to him, but that civil government must be established as soon as possible in those States where hostilities had ceased. There must be courts and law and order, or society would be dissolved.[2]

[1] John A. Campbell: *Recollections*, 9, 20, 23.
[2] *Galaxy*, April–May, 1872, 521, 663.

Mr. Stanton, in his examination before the Judiciary Committee of the House of Representatives, May 18, 1867, gives his version of the course pursued by Mr. Lincoln and the influence under which he acted. He said: "President Lincoln went to the city of Richmond, after its capture, and some intercourse took place between him and Judge Campbell, formerly of the Supreme Court of the United States, and General Weitzel, which resulted in the call of the rebel Legislature to Richmond. Mr. Lincoln on his return to Washington reconsidered that matter. The policy of undertaking to restore the government, through the medium of rebel organizations, was very much opposed by many persons and very *strongly* and *vehemently* opposed by myself. . . . I had several earnest conversations with Mr. Lincoln on the subject and advised that any effort to reorganize the Government should be under the Federal authority solely, and to treat the rebel organizations as absolutely null and void. The day preceding his death, a conversation took place between him, the Attorney-General, and myself, upon the subject, at the Executive Mansion. An hour or two afterwards and about the middle of the afternoon, Mr. Lincoln came over to the War Department and renewed the conversation. After I had repeated my reasons against allowing rebel Legislatures to assemble, or rebel authorities to have any participation whatever in the business of reorganization, he sat down at my desk, took a piece of paper, and wrote a telegram to General Weitzel and handed it to me. 'There,' said he; 'I think that will suit you.' I told him no, it did

not go quite far enough; that members of the rebel Legislature would probably come to Richmond, and that General Weitzel ought to be directed to prohibit their assembling. He took up his pen again and made that addition to the telegram and signed it. He handed it to me. I said I thought that was exactly right. It was transmitted immediately to General Weitzel and was the last act ever performed by Mr. Lincoln in the War Department."

It does not appear that Judge Campbell saw Mr. Lincoln's dispatch of April 12 to General Weitzel. This dispatch, read in the light of Mr. Stanton's statement, contains several significant sentences. He says that Judge Campbell "assumes that I have called the insurgent Legislature of Virginia together, as the rightful Legislature of the State to settle all differences with the United States. I have done no such thing. I spoke of them, not as the Legislature, but as 'the gentlemen who have acted as the Legislature of Virginia in support of the rebellion.' I did this on purpose to exclude the assumption that I was recognizing them as a rightful body. I dealt with them as men having power *de facto* to do a specific thing, to-wit, to withdraw the Virginia troops and other support from resistance to the general Government for which, in the paper handed to Judge Campbell, I promised a special equivalent, to-wit, a remission to the people of the State, except in certain cases, of the confiscation of their property. Inasmuch as Judge Campbell misconstrued this, and is still pressing for an armistice contrary to the explicit statement of the paper I gave him, and par-

ticularly as General Grant has since captured the Virginia troops, so that giving consideration for their withdrawal is no longer applicable, I wish my letter to you and the paper to Judge Campbell, both to be withdrawn or countermanded and he be notified of it." Stanton says that the following words were, at his request, added: "Do not allow them to assemble, but if any have come, allow them safe return to their homes."

The President had before him the letter of April 7 addressed to General Anderson and others by Judge Campbell, and a letter of the same date written by Judge Campbell to General Weitzel. He says that Judge Campbell misunderstood him in assuming that he called "the insurgent Legislature of Virginia as the rightful legislature." This involves a question of construction of language and carries no suggestion of misrepresentation. It is due to Judge Campbell to call attention to the fact that, in the letter of April 7, two days after the conversation with Mr. Lincoln and one day after the receipt of the letter from Mr. Lincoln, and doubtless with it before them, General Weitzel and General Shepley, the latter a lawyer of distinction, familiar with Mr. Lincoln's reconstruction plans, Military Governor of Richmond and later United States Circuit Judge, "inspected and revised" the letter to General Anderson and the letter of the Committee.[1] These letters were examined by Charles A. Dana, Assistant Secretary of War. It will be observed that the letter to General Anderson states that the letter from Mr.

[1] *Appleton's Cyclopædia of American Biography*, v, 416.

Lincoln to General Weitzel "authorized" the latter to "grant all the facilities of transportation, etc., to the members of the Legislature to meet," etc. The "Address to the People of Virginia" was signed by a Committee composed of thirty-two citizens, written by Judge Campbell, and contained the words, "*The General Assembly of the State is called for by the exigencies of the situation.* That the consent of the military authorities of the United States to the session of the *Legislature in Richmond* . . . has been obtained."

Mr. Lincoln further says that Judge Campbell erroneously assumed that he called the Legislature "to settle all differences with the United States." Judge Campbell wrote that he was of the opinion that "the object of the invitation is for the Government of Virginia to determine whether they will administer the laws in connection with the authorities of the United States." He "understood from Mr. Lincoln, if this condition be fulfilled, that no attempt would be made to establish or sustain any other authority." He thereupon set forth the "indispensable conditions" of a settlement, as stated by Mr. Lincoln, in the written "Memorandum" given to him. This letter bears date April 7, two days before Lee's surrender. The "Address to the People of Virginia," dated April 11, recites, among other occurrences, "the surrender of the Army of Northern Virginia and the suspension of the jurisdiction of the civil power" as among "the exigencies of the situation" which required "the immediate meeting of the General Assembly of the State." The

matters to be submitted to the Legislature are "the restoration of peace to the State of Virginia, and the adjustment of questions involving life, liberty, and property that have arisen in the States, as a consequence of the war."

In view of the conditions confronting the President and the people of Virginia, on April 6, 1865, it would not seem that the statement of the object of the meeting of the Legislature was subject to the criticism that it exceeded the scope of Mr. Lincoln's conversation and written "Memorandum." General Ord's letter is carefully framed. He wrote: "I am instructed by the President to inform you that, since his paper was written on the subject of reconvening the gentlemen who acted under the insurrectionary Government as the Legislature of Virginia, events have occurred anticipating the objects had in view and the convention of such gentlemen is unnecessary. He wishes the paper withdrawn and I recall my publications assembling them."

Judge Campbell replied to the letter, enclosing the "Memorandum" given to him by the President, saying: "The communication of President Lincoln to me, in respect to convening the Legislature of Virginia, was addressed to General Weitzel. I read this communication by the authority of the writer and imparted its import to those who were interested in fulfilling its requirements. The object was to restore peace in Virginia on the terms mentioned in the enclosed paper by the agency of the authorities that have sustained the war against the United States. I still think that the issue would have been

most favorable. The events that have occurred since have removed some impediments to the action sought for and preclude the possibility of failure."

This letter closed the incident, so far as Judge Campbell's personal relation to it was concerned. In the light of subsequent revelations, it appears that, unwittingly, Judge Campbell was working at cross-purposes with those who had determined to prevent Mr. Lincoln from carrying out his "plan" of restoring the seceded States to their relations to the Union. A marked and irreconcilable difference had arisen, before the collapse of the Confederacy, between Mr. Lincoln and certain Congressional leaders, regarding the status of the Southern States and the method of their restoration to their normal relations to the Union. This difference both in plan and purpose had created friction between the President and such men as Sumner, Stevens, and others who were in agreement with them. Stanton states the line of cleavage between Lincoln and those with whom he was in accord, saying that "Mr. Lincoln seemed to be laboring under the impression that there must be some starting-point for reorganization, and that it could only be through the agency of rebel organizations then existing, but which I did not deem at all necessary"; that his plan was to "treat the rebel organizations as null and void" and "to exclude the Southern leaders from any participation in the restoration of the Union." Mr. Lincoln had, in his interview with General Grant and General Sherman at City Point, on March 27, 1865, clearly outlined his plan for dealing with the State

Governments, in his instructions to General Sherman in regard to the course to be pursued by him in North Carolina. These instructions, which later, and after Lincoln's death, became the subject of controversy between General Sherman and the Johnson Administration, were probably not known to the members of the Cabinet or the Congressional leaders.[1]

On April 22, 1865, an article appeared in the "New York Tribune," purporting to give an account of the conversations between Mr. Lincoln and Judge Campbell, and of the conduct of both. Upon seeing the article, Judge Campbell, on April 26, 1865, wrote a letter, addressed to Mr. Greeley, in which he said:

"The statements in the letter are erroneous and injurious in reference to both, and it is hardly possible that they should have been otherwise. I had two conversations with President Lincoln. The first was in the presence of General Weitzel only, the second only in presence of General Weitzel and G. A. Myers, an eminent lawyer of this city. A staff officer came after me to have the first at his quarters, and the second was had on the steamer Malvern below this city, by appointment of Mr. Lincoln. I never

[1] Sherman's Memoirs; McClure, A. K.: *Abraham Lincoln and Men of War-Times*, 218, 221; Spencer: *Last Ninety Days of the War in North Carolina*, chap. XI; Stephens: *The War Between the States*, 614; Morse, J. T., Jr.: *Abraham Lincoln*, American Statesmen Series, chap. VIII; "Two War-Time Conventions," *Century Magazine* (March, 1875), XLIX, 723; White: *Life of Lyman Trumbull*, 231; Fessenden, Francis: *Life and Public Services of William Pitt Fessenden*, II, 77; Pierce, E. L.: *Memoir and Letters of Charles Sumner*, IV, 212; Welles, Gideon: *Galaxy*, May, 1872.

had the conversation with 'Jefferson Davis, Benjamin, and Breckinridge,' quoted in the letter of your correspondent, and did not inform the President that I had informed General Breckinridge that I did not intend to leave Richmond, and I should be glad to have power to confer at large upon public affairs, but I obtained no such authority to speak to him on behalf of any one. I did urge on the President the adoption of a large, liberal, and magnanimous policy as best for himself and those around me. . . . I did recommend that he should sanction a meeting of the prominent, influential, leading men in Virginia at Richmond and have their counsel and coöperation in reconstructing its political system [so] as to meet the new and extraordinary conditions of society. But the calling together of the political body, the 'rebel legislature,' was the suggestion of Mr. Lincoln's own mind. He mentioned it for the first time in our second interview as a matter he was considering . . . that it was desirable in many points of view, which he mentioned, and that if he came to a satisfactory conclusion he would make it known to General Weitzel on his return to City Point, by letter.

"The general principles I had expressed included such a proposition, and I was gratified that the President had been led to its consideration, but I did not intimate such a course in any remarks of mine, before he suggested it.

"At the interviews on the Malvern, President Lincoln produced a memorandum in writing which he read over, and commented on the various clauses

as he read them. When he had concluded he gave me the paper. It was not dated, signed, nor addressed. The conversation reported by your correspondent did not take place. . . . My intercourse with President Lincoln both here and at Hampton Roads impressed me favorably and kindly to him. I believe that he felt a genuine sympathy for the bereavement, destitution, impoverishment, waste, and overturn that war had occasioned at the South, and that he fully and exactly discriminated the wide difference both in reason and policy between the modes of proceeding in reference to the disorderly or criminal acts of individuals which disturb the security of a State and those civil dissensions and commotions which arise from the agitation of great questions which involve the social and political constitution of a great empire composed of distinct and, in some respects, independent communities.

"I believe that his scheme of pacification would have gone as far to the mitigation of the evils that have befallen the country as the circumstances allowed of.

"My direct intercourse with President Lincoln terminated with my visit to him on the Malvern. I never spoke to him or wrote to him afterwards.

"The following day General Weitzel sent for me and read the letter of President Lincoln to him upon the subject of calling together the Virginia Legislature.

"Mr. Lincoln in the course of his conversation had expressed his object in desiring them to meet and to vote. It was desirable that that very Legislature

should recognize the National authority. It was in the situation of a tenant, between two contesting landlords, who was called to attorn to the one who had shown the better title, was his remark. . . . The Legislature of North Carolina was prepared to act upon the propositions of peace. My friend Governor Graham had been prepared to advise Mr. Davis to send the commissioners who had conferred with Mr. Lincoln at Hampton Roads, to Washington to accept his terms and to settle the remaining conditions. This advice being unavailing, he was prepared to counsel State action.

"General Weitzel invited from me a letter on the subject. This letter referred to the military condition of the country. It admitted that the great natural and artificial channels of communication and avenues and emporiums of commerce and intercourse were within the control of the United States, but that the spirit of the people in the South was not broken and that a prolonged and embarrassing war might still be continued; that it was desirable to prevent this and the province of statesmanship to avoid it. My counsel was to facilitate the meetings of these legislatures to bring the minds of the people to consider of peace. The impediments to the settlement were the continuance of hostilities and the fact that the agencies of the Confederate States were indisposed to negotiations. Hence the necessity to call upon the Legislature and suspend hostilities. This letter was written in advance of the surrender of the army of General Lee and with the sincere purpose of stopping the war. I had a very strong impression

that the evacuation of Richmond and Petersburg would lead to the disbanding of that army without any effort on the part of its adversary. There is no sentence in that letter such as your correspondent quotes. There was no spirit, as he represents, to dictate. This letter was probably sent to President Lincoln, but it was not addressed to or for him. . . . I have found it to be proper to deny the accuracy of your correspondent's history in a Richmond paper, and I think it to be due to you to explain the significance of my denial. I do not wish this letter published. But I earnestly entreat of you not to cease your efforts to promote a broad, comprehensive, magnanimous policy in the reconstruction of the Union."

The foregoing is endorsed: "This letter was written at its date. It was not sent and found in my desk after my imprisonment. It is a record of the time."

Judge Campbell was arrested on the night of May 7, 1865, and imprisoned at Fort Pulaski.

The Richmond incident had deeply offended certain persons in authority in Washington, and Judge Campbell was marked for punishment and to be placed in such a position that he could not thereafter give them trouble or interfere with their plans and purposes in regard to "the conquered territories." This is made clear, by reference to a letter written by Judge Campbell to R. M. T. Hunter, October 25, 1877, enclosing a letter written by him to Attorney-General Speed, August 31, 1865. This letter was written while Judge Campbell was in prison at Fort Pulaski and shown to Mr. Hunter, who was also

confined at the fort. In his letter to Hunter, he says: "You told me if I sent it, I would remain there for life. I sent it, but my family were advised not to let it go forward." In the letter to Mr. Speed, Judge Campbell writes: "I have a letter which contains the following sentence, 'It is charged in substance, and I understand with strong censure, that in the call of the Virginia Legislature, you abused the confidence of Mr. Lincoln, misrepresenting his views and promises and, by perversion, misled General Weitzel into grave error of official misconduct. It is alleged that you violated and concealed the explicit condition laid down by Mr. Lincoln that the public men of Virginia were to meet only as individuals called together for consultation and to promote order; and it is further alleged that Mr. Lincoln's memorandum, as furnished by yourself, supports the views taken of your conduct. This affair was stated to be not the sole, but a cogent motive of your captivity and its continuance.' In reply to inquiries occasioned by this statement, I learn that the Attorney-General made this statement to an eminent citizen of the United States. I hope that you will pardon me for intruding upon you a reply to the charge."

After stating the circumstances under which he met Mr. Lincoln and the conversations, as set out in the letter to Mr. Greeley and the "Recollections," Judge Campbell says: "My suggestion to Mr. Lincoln had not extended to the call of any legal or political body. I say to you the first suggestion came from him, and in the manner I state. . . . The following day General Weitzel sent for me to read a

letter from Mr. Lincoln. This letter has been published. I understood that letter to authorize a call for the Virginia Legislature to come to Richmond, to vote upon the restoration of Virginia to the Union, and to perform any other legal acts in harmony with the policy of peace and union. . . . I asked General Weitzel if others than the members of the Legislature would be allowed to go to Richmond. He answered yes, and he would afford transportation and facilities to them. . . . I wrote a letter to General J. R. Anderson, explaining what I had done, read it to General Shepley in presence of Mr. Dana, Assistant Secretary of War, and left the original to be copied in that office. No objection was made to this letter. The letter convening the Legislature was examined by General Shepley and corrected by him. His corrections were assented to and the letter went forth in the form he agreed to."

After a full account of every step taken by him, Judge Campbell concludes: "My entire action and interference has now been stated. You will see that I neither misunderstood nor misrepresented Mr. Lincoln as stated. Mr. Lincoln desired the Legislature of Virginia to be called together to ascertain and to test its disposition to coöperate with him in terminating the war. He desired it to recall the troops of Virginia from the Confederate service and to attorn to the United States and to submit to the National authority. He never, for a moment, spoke of the Legislature except as a public corporate body, representing a substantial portion of the State. . . . Mr. Lincoln could not have employed the language

he did in his memorandum, his letter to General Weitzel, or his conversation to me, with such a significance as is attached to it in the charge I am answering. It never entered into my imagination to conceive that he used the word 'legislature' to express a convention of individuals, having no public significance or relations. . . . I had no motive for concealment nor interest in abusing Mr. Lincoln's confidence. . . . I did not mislead General Weitzel. He heard every word that Mr. Lincoln spoke to me, and Mr. Lincoln wrote him and not to myself. He had intercourse with Mr. Lincoln, to which I was not a party. There was no explicit condition in Mr. Lincoln's letter to General Weitzel. Mr. Lincoln authorized him to allow a call for the Legislature and to exhibit to me his letter. The Legislature was to act loyally after it met and, if not, to be dispersed. That was all. The memorandum furnished to me only strengthened the conclusion that the Legislature was to be convened as a public corporate body. The pledge was if any State would abandon the contest and withdraw its troops that confiscation would be discharged. How was a State to comply except through its authorities? Mr. L. wanted prompt, efficient action to terminate a ruinous war, and we must infer that he expected the usual means for the purpose, and besides this he designated the Legislature as the appropriate instrument to be employed. My wishes were consistent with Mr. Lincoln's. I desired peace for a ruined, distressed people. I did not suggest benefits for myself. I did not importune amnesty or preferment. . . . It was for

the people that I made intercession. I counseled the conqueror to use magnanimity, forbearance, kindness for his own honor and advantage, not specially for mine. I asked no boon for myself. . . . I appeal to your sense of right, in reference to this grave accusation, and ask you to give me the evidence upon which such charges and assertions depend. I have not complained of Mr. Lincoln's alteration of his policy, nor of the order revoking the call of the Virginia Legislature. General Ord assigned to me, as the cause of the change of the order, the change which events had made in the condition of affairs. The change was great [General Lee's surrender, April 9, 1865], and Mr. Lincoln had contracted no debt by any promise or declaration to me which forbade a change in his policy. I held no commission nor power to bind any one. . . . But I have a right to be exempt from all unjust censure and from all misrepresentation of my connection with these events and from all unjust accusations."

One of these letters was written within a month, and the other within four months, of the time that the transaction occurred. It is only necessary to refer to the history of the time, and the conditions created by the struggle being carried on for supremacy by those members of Johnson's Cabinet and their Congressional associates, to carry into effect Lincoln's plans, and those who, with Sumner, Stanton, and Stevens, were determined to treat the Southern States as "suicides" and "conquered provinces," and their people as "traitors," to understand why Judge Campbell's family and friends did

not think it "prudent" to permit the letters to be delivered to those to whom they were addressed.

Judge Campbell's interpretation of Mr. Lincoln's plan to secure peace and restore the Southern States to their relation to the Union, in so far as it was within the power of the Executive Department to do so, is sustained by reference to the instructions given by Mr. Lincoln to General Sherman at City Point, March 27, 1865, in regard to the course which he should pursue upon reaching Raleigh, North Carolina, and the letters addressed by General Sherman to Governor Vance, April 12, 1865.[1]

Mr. Rhodes, referring to the incident, says that "it has larger and more permanent interest" than Judge Campbell's personal relation to it because of "its bearings on the after history of the opposition of the radical Republicans to any such mode of reconstruction." [2]

Judge Campbell in this letter says that Stanton had some time prior to that date told Mrs. Campbell that the cause of his arrest was his endorsement on a letter from a man by the name of Alston to Mr. Davis, in which Alston proposed to assassinate Mr. Lincoln and other Union leaders and requested an interview for the purpose of unfolding his plan. Of this incident Judge Campbell said: "In regular course of the routine of the office I had referred it to

[1] *Z. B. Vance Papers*, Collections of North Carolina Historical Commission; Spencer: *Last Ninety Days of the War in North Carolina*, chap. XI, 145; McClure: *Abraham Lincoln and Men of War-Times*, 221; Sherman's *Memoirs;* McCall, S. W.: *Thaddeus Stevens*, American Statesmen Series, 239.

[2] Rhodes: *History of the United States*, 134.

the Adjutant-General 'for attention,' it being his duty to examine and dispose of letters between parties. My own statement and that of General Cooper, Adjutant-General, and four of his assistants, have been filed with my application for amnesty, to show that this endorsement was no cause whatever to subject me to death or bonds." His arrest was made at night, without any notice or means to answer or explain.

On August 1, 1865, while Judge Campbell was imprisoned at Fort Pulaski, without his knowledge Judge Benjamin R. Curtis wrote from his home at Pittsfield, Massachusetts, to President Johnson:

"I address you respecting Mr. John A. Campbell, with whom I sat on the Bench of the Supreme Court, and who is now a prisoner in Fort Pulaski. Though my intercourse with Judge Campbell ceased with my retirement from the Bench, I have retained a strong regard for him, founded on his purity and strength of character, his intellectual power, his great attainments, and his humane and genial nature. . . . Judge Campbell, as you, I believe, know, was not only clear of all connection with the conspiracy to destroy the Government, but incurred great odium in the South, especially in his own State, by his opposition to it, and by his views of the power and intention of the Government and the fallacy of the ideas upon which the attempted revolution was based. I can conceive that reasons may exist, apart from the merits of his own case, why he should not receive a pardon at the present time, and as that subject has recently been under your con-

sideration, I desire to say nothing concerning it, but I venture respectfully to ask your attention to the question whether his release on parole, with such limitations as you may think needful, would not promote the public interest. From his former position, his opposition to counsels which have proven so disastrous, his known devotion to the interests of the Southern people, his ability and his weight of character, he can undoubtedly exert an important influence over Southern opinion; and if, as I am convinced, that influence will be used to promote the pacification of the country, and the conciliation of Southern opinion to the necessities of their condition, and the just demands of the Union, it cannot fail to be useful in an important degree. At present his influence for good is paralyzed, and his imprisonment is, in effect, a continual and conspicuous representation to the people of the South that he is hostile to the Government and desires to obstruct its measures. I believe this is unjust to him and unfavorable to the prevalence of those feelings and opinions which you desire to promote."

Judge Campbell, upon learning of this generous act on the part of Judge Curtis, wrote him a letter, which was published in the *Century Magazine*, October, 1889.[1] Judge Nelson also wrote to President Johnson.

Some time after the receipt of these letters, the President, by an executive order, released Judge Campbell from imprisonment. He resumed the practice of his profession at New Orleans and never again held public office.

[1] Vol. xxxviii, No. 3, 950.

At this time he gave expression to his views regarding the results of the war, its effect upon the South, and his outlook for the future, saying: "I concur in the policy of abolishing negro slavery throughout the United States. I regard the revolution as the most radical and momentous that has ever occurred in any country. Much of the burden will fall upon the people in the Confederate States (so called). It changes the conditions as to nearly all, as to future and temporal prosperity. It requires for its success wisdom, prudence, patience, and patriotism. I venture to suggest that it also requires profound quiet and sense of security. This change in the conditions of men and of a country affords a fruitful lesson to this generation and posterity, and this lesson cannot be enforced by confiscations or criminal prosecutions. It seems to me that the lessons that Mr. Burke has taught in his speech on 'Reconciliation in America' and his tract on 'The Policy of the Allies' will find an application to the circumstances of this case. For myself, I can say that, in the trying condition in which I have been placed, I have endeavored to perform my duty. I have not, at all times, satisfied myself. I have failed in satisfying others. My friends in the beginning of the war bestowed on me obloquy and reproach, and violent men threatened contumacious treatment. I was an alien among them. They have repented and are now ready to hail me as their friend. I have endured reproach then and more latterly because I was ready for reconstruction when others were for war to the knife."

Judge Campbell's property in Mobile, upon which he depended for the support of his family, had been destroyed. In these days of restored National unity and general prosperity, it is difficult to understand or estimate the burdens which in 1865 bore upon men past middle life, broken in fortune, deprived of the rights of citizenship, confronting a future filled with uncertainty, or the depressing conditions under which they began the work of restoration and rebuilding. It behooves the people of the South to teach not only their own children, but also those of the North and West, the hearts of whose fathers were in those days filled with the pride of military success and passion engendered by political and sectional controversies, of the courage, fortitude and patience of the men of the South of 1865. But for them, their courage, their steadfastness of purpose, and their precept and example, the temporary success of those who sought to perpetuate the passions of the Civil War and the domination of a sectional party would have indefinitely postponed peace and national unity. It is but justice to honor the memory of those men. It is neither necessary nor relevant to their vindication to enter into controversy regarding the motives or wisdom of those who sought to "drive them out of the country," and who insisted that they should "have no participation whatever in the business of reorganization of the States." Happily, in both North and South there remained a remnant who saw their duty clearly and had the moral and political courage to walk in the light of a clearer vision and larger hope. They and

those who differed from them have passed away; the record which they made constitutes the evidence upon which the judgment of impartial history must be rendered. The jury which time empanels will do them justice, and from this verdict and judgment those who hold in sacred keeping the fair name and character of Judge Campbell will have no cause to appeal. In the words of a wise, patient, and patriotic man of the South of those days:

"It all seems clear enough to us now. We look back along the way we have come, and we do not now see how we could have gone any other way. But we are forgetting how dark it was. Never, in all history, did thicker darkness descend upon a people, and so suddenly. A President had been slain; another, his successor, stood before us impeached, distrusted, and despised by those who had placed him in office. Our State Governments were dismantled and our States become military provinces. Our leading citizens were in prison or their rights of citizenship denied them. Our emancipated slaves were appealing to us, as never before, to care for them in their new relation to us. Our wasted fields and homes remained to us, only to remind us of our former estate and our wretched poverty. The soldiers of the blue and the gray looked into each other's faces, aghast at the ruin they had wrought, ready and willing to be friends, while the foundations of the Union shook beneath their feet with a tremor more ominous than the shock of battle. One false step, and the ruined South with blinded rage might pull down the pillars of our Government in

the very strength of its agony. We have called these dark days our era of reconstruction. History will be true if it shall write above this chapter, as its title, the words of Thomas de Celano's hymn of the judgment, '*Dies iræ, dies illa.*' . . .

"These men of the South differed in their political creeds as the billows, but in their sense of duty, each to his own State, they were one as the sea. . . . Their struggle has ended. Let us believe and be thankful that in the providence of God it has ended well and with honor and good to us all.

"And so, too, has ended our era of reconstruction. We have rebuilt our Union, and we pray that, when the rain descends, and the floods come, and the winds blow and beat upon it, it may not fall, for it is founded upon a rock. Slavery no longer mars our structure." [1]

[1] Mason, Thomas W.: *The Value of Historical Memorials in a Democratic State.* Publications of the North Carolina Historical Commission, Bulletin No. 7, pp. 85, 88.

CHAPTER VIII

THE SLAUGHTER-HOUSE CASES AND THE FOURTEENTH AMENDMENT

An understanding of the conditions under which Judge Campbell entered upon the last and most fruitful years of his life requires a reference to the situation with which he was confronted when released from Fort Pulaski. As we have seen, his efforts to save from the fate which he saw impending the people to whom, by birth, association, and the most sacred ties of social and political relationship, he was attached, met with failure, his conduct was misrepresented, and his motives misconstrued, resulting in imprisonment. Bereft of such estate as he had accumulated by his labor prior to the war, disfranchised and in his professional labors restricted to the State courts, the only resource left for providing for his family, his moral courage and sense of rectitude of purpose enabled him to await with patience the coming of a brighter day and a larger opportunity for service.

Justice McLean, upon learning that Justice Curtis contemplated resigning, strongly urged him to remain on the Bench, suggesting that he "would feel a little awkward at the Bar." Since the departure by the States from judicial life tenure, many judges have retired from the Bench and met with large success, adding to their reputation and financial rewards, at the Bar. It is, however, usually uncertain

whether judicial life and labor do not weaken the taste and lessen the capacity for professional work, especially in the trial of causes before courts and juries. The condition under which Judge Campbell retired from the Bench, and the future which appeared to confront him, were depressing and, at the age which he had reached, discouraging.

Judge Curtis and Judge Campbell are the only American lawyers who, after service on the Supreme Court Bench of the United States, have returned to the practice of their professions. Of them Mr. Carson says: "It is a matter of satisfaction to record that the influence of Curtis and Campbell upon the Bench which they quitted was not lost, as in after years no men appeared at the Bar whose arguments made a profounder impression." [1] By those familiar with their careers it was thought that they did the best work of their professional lives after they returned to the Bar.

Mr. William A. Maury said of them: "It was a great loss to the Supreme Court when Judge Campbell and Judge Curtis left it. They were, to some extent, the complements of one another, somewhat as Marshall and Story were, and, of course, no Court could lose so much mental vigor and learning as they represented, without feeling deeply the deprivation. It may be said that both these Judges did the best work of their professional lives after they returned to the Bar. This was certainly true of Judge Campbell." [2]

[1] Carson, H. L.: *History of the Supreme Court*, 350.
[2] *Memorial Addresses — Justice Campbell*, 8.

Judge Curtis's biographer has given a valuable and interesting record of the professional labors of his distinguished brother. The second volume of the "Memoir" contains a collection of his professional arguments and public addresses. From the "Opinion Books," kept by Judge Curtis, are selected a number of his "opinions" given to clients upon questions of constitutional, corporation, and commercial law. The author gives a list of the cases which he argued subsequent to his resignation in the Supreme Courts of Massachusetts and of the United States, and the questions presented. Unfortunately, Judge Campbell left no record of his professional labors other than several volumes of briefs and arguments. From these we are enabled to form an estimate of the character and extent of his work during the last twenty years of his life.

Seeing in the city of New Orleans a larger opportunity for success than in Mobile, in the discharge of the duties which he owed to those dependent upon him during the last days of 1865, he made his home there. By reason of its commercial importance, the changes of its social, industrial, and commercial life, wrought by the war and its results, and the certainty of its growth and development, New Orleans offered, perhaps, the most attractive field for the practice of law in the South. Many questions novel in character, important in respect to the interests involved, and difficult of solution, were sure to arise in the readjustment following the Civil War.

Judge Campbell was warmly welcomed and

promptly took his position among those in the front ranks of the profession. Mr. Carleton Hunt, of the New Orleans Bar, says of Judge Campbell's career: "Coming to the practice of the Bar of New Orleans, he threw himself into the contests in which he became engaged, with a degree of intensity which it is difficult to express. He became absorbed in his professional undertakings. He would sit for hours in his great library lost in thought, without turning the leaves of the volume before him. At other times, he would walk in the streets gesticulating, as he went, to the surprise of all who passed him. He spoke in Court customarily from the many books spread out before him. His language seemed to be borrowed from the books and was apt to be technical and quaint, as the authorities themselves. His style, for the most part, was measured and grave, as became his years and standing at the Bar. From time to time, however, as he caught fire from the concussion of debate, he became inflamed and fierce in his assaults upon his adversary's side. There were occasions, seldom coming, but full of excitement as they arrived, when his utterances were filled with a degree of eloquence, which aroused in those who knew him like feelings and passions with those with whom the speaker contended."

He formed a partnership with Judge Henry M. Spofford, formerly of the Supreme Court of Louisiana, and his son, Duncan G. Campbell. The firm immediately entered upon a large practice. Judge Campbell, by reason of his long experience at the Bar prior to the war, and the reputation which he

had made on the Bench, was retained in many novel and interesting cases. It was not until after the decision in *Ex parte* Garland [1] that Southern lawyers were permitted to practice in the Federal Courts. The first appearance which he had in the Supreme Court of the United States was Waring *vs.* The Mayor,[2] and associated cases, on writs of error from the Supreme Court of Alabama. The cases involved the validity of a tax levied by the State and the city upon merchandise brought into the city of Mobile from other States and from foreign countries; several interesting questions presenting the much-debated right of the State to tax imports. The Court held, Justice Nelson dissenting, that the laws were valid. In the "Tonnage cases" [3] he successfully attacked the statute of Alabama, levying a tonnage tax on steamboats and vessels navigating the rivers of the State, as violating the constitutional provisions prohibiting any State from laying any duty of tonnage.

Judge Campbell did not appear in other cases of unusual public interest in the Supreme Court until the December Term, 1872, when he argued the famous Slaughter-House cases, presenting, for the first time, the construction of the Fourteenth Amendment. The cases presented several interesting questions, and the argument and decision have had a permanent and far-reaching influence upon the National jurisprudence. They were submitted to the Court upon the following facts:

[1] 4 Wall. 333 (December Term, 1866).
[2] 8 Wall. 110. [3] 12 Wall. 204.

"The legislature of Louisiana, during the year 1869, enacted a statute entitled: 'An Act to Protect the Health of the City of New Orleans, to Locate Stock-Landings and Slaughter-Houses,' incorporating the Crescent City Live-Stock and Slaughter-House Company." The charter conferred upon the corporation, composed of seventeen persons, for twenty-five years the exclusive right to establish and maintain within the city and parish of New Orleans and the parishes of Jefferson and St. Bernard, comprising 1154 square miles, containing more than three hundred thousand persons, stock-landings, yards, wharves, stables, slaughter-houses, abattoirs, and other buildings for landing and keeping horses, mules, and other animals for sale and for slaughtering, charging therefor such fees as were fixed by the charter. All other persons living within the city of New Orleans and parishes named, were prohibited, under heavy penalties, from landing, keeping, or slaughtering any animals at any other places than those established by the corporation. More than one thousand persons within the district were engaged in buying and selling stock, animals, and cattle, and more than three hundred were engaged in slaughtering for market and selling animals and cattle. The latter had organized the "Benevolent Butchers' Association."

The Attorney-General of Louisiana, in behalf of the State, filed a bill in the State Court for the purpose of enjoining the defendants, engaged in the business of slaughtering animals for market, from prosecuting their business within the prohibited

territory or doing any other acts prohibited by the statute. The Benevolent Butchers' Association also filed a bill to enjoin the Crescent City Live-Stock Association from enforcing the provisions of the statute.

For the corporation, the case was argued in the State Supreme Court by Randell Hunt, Professor of Civil Law in the State University, William H. Hunt, later Secretary of the Navy and Judge of the International Court of Egypt, and Christian Roselius, the leader of the Civil Law Bar of Louisiana, and the Attorney-General of the State. For the Butchers' Association and other parties, the case was argued by Fellows & Mills, Cotton & Levy, Campbell, Spofford & Campbell, and Edward Bermudez, later Chief Justice of Louisiana. The State Supreme Court sustained the statute and rendered a decree for the corporation, Ludeling, Chief Justice, writing the opinion, to which Justice Wyly dissented.[1]

In a suit involving the same question Justice Bradley, sitting in the Circuit Court, enjoined the enforcement of the prohibitory provisions of the statute.[2] Upon appeal to the United States Supreme Court the causes were argued by Mr. J. Q. A. Fellows and Judge Campbell for appellants and by Jeremiah S. Black and Matthew H. Carpenter for appellee.

The cases were twice argued. On the first hearing, Judge Nelson was unable to be present, and as the Court was divided, a reargument before a full bench was ordered. In view of the division of the Court in

[1] 22 La. Ann. 546. [2] 1 Woods, 51; 15 Fed. Cases, 8408.

the final disposition of the case, it is probable that the Justices were, upon the first hearing, evenly divided.[1]

Judge Campbell's argument has been preserved. He rested it upon three propositions: That the Louisiana statute created a monopoly; that it imposed servitudes upon the people of the district, and that it unlawfully restricted the use of their property, in violation of the Thirteenth Amendment; that it deprived the citizens of the United States, residing within the district, of their rights, privileges, and immunities, thereby violating the provisions of the Fourteenth Amendment.

He thus states the case, as presented by the record: "A large body of persons, hundreds in number, had been conducting a lawful business in a lawful way, for many years: they had invested capital and labor, and had acquired skill, in this useful business, for their own benefit, the subsistence of their families, and the welfare of the community. By a legislative act these buildings and other constructions for the purpose were closed. They were deprived of power to erect other buildings, or to employ their capital, skill, and labor, with freedom. Seventeen designated persons were vested by the Legislature with the sole and exclusive power to conduct and carry on this business. . . . All persons must work in these abattoirs or not at all, in the vocation of preparing meat for market. The corporation receives a price determined in its charter. In a word, a great monopoly of trade which has always existed

[1] Slaughter-House Cases, 16 Wall. 36.

has been granted to seventeen favored adventurers. . . . That this was done for the private gain of these seventeen is shown by the fact that whatever has been seized and obstructed from the members of these associations and these tradesmen has been granted to this company of seventeen."

Judge Campbell conceded the power of the Legislature, in the exercise of the police power, to enact reasonable rules prescribing the places and conditions under which stockyards and slaughter-houses should be established and maintained. The Federal questions were presented by the contention that the statute violated the provisions of the Thirteenth and Fourteenth Amendments. The question whether the exclusive privileges granted to the Crescent City Slaughter-House Company by the charter created a monopoly was involved in, and relevant to, the solution of the Federal questions. While his principal and, as he thought, strongest contention applied to the Fourteenth Amendment, his argument upon the other phase of the case is interesting and forceful. Beginning with an examination of the origin and history of the clause in the Ordinance of 1787 for the Government of the North West Territory, providing that there should be, in the Territory, neither "slavery nor involuntary servitude otherwise than for the punishment of crime," the traces the history of the incorporation of this language into the Thirteenth Amendment. He says that, although no clause has been the occasion of so much discussion, he has not been able to find any definition of the language. He proceeds to an

examination of the various kinds and characters of personal slavery in ancient and modern times, reaching the conclusion that the terms "slavery" and "servitude" are not synonymous; that the latter includes a status or burden upon persons and property, differing from the former. By the charter of the Crescent City Live-Stock Company every man within the three parishes was required, if he exercised the trade of preparing animal food for the market, to do it in the houses of the company and not elsewhere. Every man, if he had a horse, mule, or other animal for sale, and brought them within these parishes, must carry them to the landing-places, yards, stables, or pens of the company. These were personal acts which the owners must perform. The act, he insists, imposes a personal servitude.

Referring to the burdens imposed by the act upon property within the parishes, he says: "It strikes with incapacity every parcel of land within these parishes for a particular work, except a certain portion which may be used by that corporation. It does not set apart a particular district of land for the purpose of the erection or support of slaughter-houses, but it strikes with incapacity every property for that purpose which is not owned by the company." He pressed upon the attention of the Court the decision of the French Court, that the decree of Louis XVI, of 1779, suppressing *banalités*, abolished "servitudes" whereby the tenant was required to carry his wheat to the mill of the *seignior*. The decree declared "that all rights of *banalités* of the oven,

mill, wine-press, slaughter-house, forge, and the like, whether founded on custom, prescription, or judicial sentence, should be abolished without indemnity." He also stresses the English Statute of 1799 abolishing thirlage. After a thorough discussion of the meaning of the term "servitude," as used in English and Continental law, he cites American State decisions to sustain his contention. Concluding this branch of argument, he says: "If the Legislature can barter away to a corporation exclusive privileges and strike the land with disabilities, the land will soon become a desolation and a waste."

When Judge Campbell reaches the discussion of the Fourteenth Amendment, he strikes a stronger note and speaks with a larger degree of confidence, saying: "The Fourteenth Amendment embodies all that the statesmanship of the country has ordained for accommodating the Constitution and the institutions of the country to the vast additions of territory, increase of the population, multiplication of States and territorial governments, the annual influx of aliens, and the mighty changes produced by revolutionary events and by social, industrial, and commercial development." With this broad basis for his argument, he observes that "whether the Amendment will be esteemed a full and proper solution of the important problems presented, it is apparent that, by the first clause, the National principle has been indefinitely enlarged. The tie between the United States and every citizen in every part of its jurisdiction has been made intimate and to the same extent the Confederate features of the Govern-

ment have been obliterated. The States, with their connection with the citizen, are placed under the oversight and enforcing hand of Congress. The purpose is manifest to establish, through the whole jurisdiction of the United States, one people, and that every member of the Empire shall understand and appreciate the constitutional fact that his privileges and immunities cannot be abridged by State authority. . . . Unquestionably a very large share of blessings are stored and garnered here as in a common repository. Here is the hope of the laboring man; the confidence and trust of the merchant; the stability, success, and profit of the agriculturist; the leisure and inspiration of the student, and the peace, the comfort, the enjoyment of the family and the home." He assumes that "the Fourteenth Amendment was not adopted as an act of hostility, nor designed to sow discord; nor to answer an ephemeral or unworthy purpose. Those who deprive the first clause of its vitality, and demand an interpretation which would leave the State Governments in possession of their powers over persons and property unimpaired, place a stigma upon the authors of the article. The remaining parts had been, for the most part, executed. They had not produced wholesome results. The first section remained. The command of the section to the State Governments to maintain prescribed bounds, and to Congress to enforce obedience to the command, is imperative. The excesses apprehended were invasions of the personal rights of individuals under color of authority. Two forms of invasion were apprehended. The States

might deny individual rights and liberties, and claim to perform all of the offices and duties of society under the names of socialism, communism, and other specious pretenses, control all the revenues and labors of the State, or the advantages, benefits, partialities, privileges of the State might be conferred upon a few to the detriment and oppression of the people."

Campbell called attention to the fact that the corporation had, since the institution of the suit, purchased the property of one of the defendants, "and are using it for the very purpose for which the defendants are prohibited from acquiring or using it, by this decree." He conceded the right of the State to grant its public lands, establish public ferries, and appropriate its public revenues, because these rights were vested in the State for such purposes, but insisted that " the rights of a man, in his person, to the employment of his faculties and to the product of those faculties, do not come to him by any concession of the State, nor can he be deprived of them by any law of the State. They are his inviolable prerogative." He drew a distinction between the right of the State to prohibit a person, in the use of these natural rights, to create a nuisance, contaminate the atmosphere, pollute the water, or sell putrid food, and the power, asserted by the statute, "to banish from three parishes an important and necessary occupation which prevails in every community, an edict which inflicts injury upon hundreds of individuals in their property and their business, and confers upon the corporation the ex-

clusive right to the enjoyment of the liberties of which the people are deprived. That no consideration of public health required that what was denied to all should, under an exception, be allowed, as a favor to seventeen persons. . . . Can there be any centralization more complete, or any despotism less responsible, than that of a State Legislature concerning itself with dominating the avocations, pursuits, and modes of labor of the population; conferring monopolies on some, voting subsidies to others, restraining the freedom and independence of others, and making merchandise of the whole?"

Contending that the statute created a monopoly, and imposed unjust and unequal burdens upon persons and property, he asks: "If an ordinance be unreasonable, if it be unequal, if it be unjust because of its inequality, does it not fall within the exact letter of the Fourteenth Amendment?" This inquiry suggests the larger one upon which depended the extent to which the Amendment had restricted the power of the States and enlarged the power of the National Government.

After an examination of what he insisted were the natural rights, the privileges, and immunities of every American citizen, he quoted the language of the Amendment, saying: "If the right of a man to choose and prosecute a lawful industry reaches to the rank of a personal privilege, and his hopes and expectations either of happiness or of profit shall be classed as property, then the Fourteenth Amendment to the Constitution stamps with nullity the act of the Legislature of Louisiana. . . . This

Amendment takes the child at the moment of his appearance in the world and proclaims to the world 'he is our citizen'; he is endowed, from the very moment of his birth upon our soil, with privileges and immunities that no State shall make or enforce a law to abridge." He repeated and emphasized his contention that the Fourteenth Amendment worked a radical change in the relation which every citizen of the National Government bore to that Government. By its first clause fixing the status of citizenship every person born within the jurisdiction of the United States derives his state and condition from its authority. It says to the State, "that this citizen of ours must not be disturbed in his privileges and immunities, or in his life, liberty, or property, brings the Government into immediate contact with every person, and gives to every citizen a claim upon its protecting power."

In conclusion he insisted that the American people had, by their Constitutions, secured freedom: "free action, free enterprise, free competition. It was in freedom they expected to find the best of auspices for every kind of human success. They believed that equal justice, the impartial rewards which encourage to effort in this land, would produce great and glorious results. They made no provisions for sinecures, pensions, monopolies, titles of nobility, privileges, orders, exempting from legal duty. What they did provide for was that there should be no oppression, no pitiful exaction by petty tyranny, no spoliation of private right by public authority, no yoke fixed on the neck for work to

gorge the cupidity and avarice of unprincipled officials, no sale of justice nor of right, and there should be a fair, honest, faithful government to maintain what were the unchartered prerogatives of every individual man and now the constitutional, inviolable rights of an American citizen."

The extent and variety of authority, judicial and historical, which Campbell brought to the support of his argument fully sustains Mr. Maury in saying: "He seemed to have levied a contribution on the literature and learning of the world to show the intolerance of the common law of monopolies, and to furnish authentic examples of the almost infinite devices by which the strong have in all countries and in all ages managed to destroy or curtail the right of every individual to exercise his faculties in any way that might seem good in his own eyes, saving of course the rights of others." Justice Miller said: "The eminent and learned counsel who twice argued the negative of this question [against the monopoly] has displayed a research into the history of monopolies in England and the European Continent, equaled only by the eloquence by which they are denounced."

Whatever may be thought of the application of the principles which Campbell made to the case before the Court, there can be no question of their truth, the force with which he stated and the powerful array of learning with which he supported them. Again quoting Mr. Maury: "It is but to look at almost any page of the opinion of any of the Judges who spoke on that occasion, to see what a profound

impression was made by the great advocate battling against the stupendous monopoly that had grasped the insidious power to compel every man within a large area of country who had a beast to slaughter for food to come to its slaughter-house to do his butchering. . . . When we look at the reach and extent of the research and learning displayed by Judge Campbell in that case, it may well be asked if ever that great Court in all of its history had witnessed at its bar, in any previous case, more if so much learning."

It is a source of regret that the arguments of Campbell's great antagonists in this battle of giants, Jeremiah S. Black and Matthew H. Carpenter, are not preserved.

The Fourteenth Amendment was proposed to the States on January 14, 1866, and, on July 21, 1868, was declared to have been ratified by a sufficient number of States and thereby became a part of the Constitution. It had its origin and principal support in the controversy which arose subsequent to the emancipation of the negroes, and, as shown by the debates in Congress and the State Legislatures, was intended to bring the newly enfranchised slaves within the protection of Congress. Although it had been a part of the Constitution since 1868, no case involving the rights of a colored person had found its way to the Supreme Court. The Slaughter-House cases came on for final decision at the December Term, 1872.

Justice Miller, writing the opinion of the Court, after deciding that the statute was within the police

power of the State, and stating the Federal question raised upon the record, says that the Court is, for the first time, called upon to give construction to the two Amendments, continuing:

"We do not conceal from ourselves the great responsibility which this duty devolves on us. No questions, so far-reaching and pervading in their consequences, so profoundly interesting to the people of this country, and so important in their bearing upon the relations of the United States and of the several States to each other and to the citizens of the United States, have been before this Court during the official life of any of its members."

He disposed of the attack upon the statute, based upon the Thirteenth Amendment, in a few lines.

Proceeding to the discussion of the Fourteenth Amendment, he laid the basis of his attack upon Judge Campbell's argument by limiting the meaning of the term "citizen of the United States," as used in the first clause. It is interesting to note that Justice Miller follows the line of thought resorted to by Chief Justice Taney in the Dred Scott case. He adopted the historical method for interpreting the sense in which the language was used by the framers of the Amendment, and concluded that he found, by reference to the history of the time, that the pervading purpose lying at the foundation of the Thirteenth and Fourteenth Amendments was to secure the firm establishment of the freedom of the negro from the oppressions of those who had formerly exercised dominion over him. While he con-

ceded that probably others may seek protection under the provisions of the Amendments, this purpose must have fair and just weight in any question of their construction. While this rule, resorted to for aiding in the construction of statutes and constitutions, is useful and helpful, it is restrictive in its influence upon the mind of the judge. It invites him to approach the construction of the language used by those who framed the Constitution, from a backward rather than a forward view. As in the Dred Scott case, Chief Justice Taney, putting himself in the position of the statesmen of 1789, reached the conclusion that they intended to include in the term "citizen," used in the Constitution, only persons of the white race, so Justice Miller, in defining the words "citizens of the United States," by the same mental process, found that those who framed the Fourteenth Amendment had in mind only negroes, and that "their main purpose was to establish the citizenship of the negro, can admit of no doubt."

Judge Campbell, on the contrary, took a larger view of their purpose and caught a larger vision of the scope of its accomplishment. To his mind every person then within the jurisdiction of the United States and every child born, or person naturalized, was lifted, as it were, into the status of National citizenship, with the power of the National Government pledged to the protection of his rights, privileges, and immunities, and every State prohibited from making or enforcing any law abridging such rights and privileges. The singular spectacle is pre-

sented of the States Rights, Southern Democratic lawyer urging the broadest, largest National view and the Northern-Nationalist Republican Judge enforcing a much narrower application of the language, in ascertaining the intention of those who framed the Amendment.

Justice Miller, having thus laid the basis upon which to support his conclusion, says: "The next observation is more important, in view of the arguments of counsel in the present case. It is, that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to be a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union." Here again, the minds of Judge Campbell and Justice Miller diverge. Justice Miller first finds in the Amendment the creation of a dual citizenship. Judge Campbell finds that, as there is but a single source of citizenship, so the rights, privileges, and immunities of such citizenship inhere in, and proceed from, this National citizenship, and these the State may not abridge. Justice Miller concludes that, as the Amendment creates a dual citizenship, so there is a corresponding duality of rights, privileges, and immunities. One class of rights and privileges is his by virtue of his national citizenship, and for the protection of these he may rely upon the Fourteenth Amendment. Other rights, privileges,

and immunities are his by virtue of his State citizenship, and for these he must look to the State. With these propositions established by the majority of the Court, not only was the foundation of Judge Campbell's argument destroyed, but a construction of the Fourteenth Amendment was incorporated into the National jurisprudence which essentially weakened and narrowed its scope, and disappointed the purpose of those who framed and secured its adoption. With this distinction established, the sole question remaining for the Court was to declare in which class fell the rights, privileges, and immunities alleged to have been abridged by the act. Justice Miller adopts the classification announced by Justice Washington, in Corfield *vs.* Coryell,[1] and holds that those rights, asserted by Judge Campbell to have been abridged by the statute, do not come within the class which attach to Federal citizenship, secured by the Amendment from abridgment by the State.

Justices Field, Bradley, and Swayne filed opinions, in which Chief Justice Chase concurred, dissenting from each and every one of Judge Miller's propositions and conclusions. After stating the status of American citizenship, prior to the adoption of the Fourteenth Amendment, Justice Field, adopting Judge Campbell's view, says: "The first clause of the Fourteenth Amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States,

[1] 4 Washington, Circuit Court, 371.

and it makes their citizenship dependent upon their place of birth or the fact of their adoption, and not upon the constitution or laws of any State, or the condition of their ancestry. A citizen of a State is now only a citizen of the United States residing in that State. The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States and are not dependent upon his citizenship of any State. . . . They do not derive their existence from its legislation and cannot be destroyed by its power. The Amendment does not attempt to confer any new privileges or immunities upon citizens or to enumerate those already existing." He further says that if the Amendment has no other effect and protects against State abridgment no other rights, privileges, and immunities than enumerated in the opinion of the majority, "it was a vain and idle enactment which accomplished nothing and most unnecessarily excited Congress and the people on its passage."

Justice Field also follows Judge Campbell's argument in regard to the effect of the monopolistic features of the statute upon the privileges and immunities of the citizens of the United States residing in the territorial district to which they applied, saying: "All monopolies, in any known trade or manufacture, are an invasion of these privileges, for they encroach upon the liberty of citizens to acquire property and pursue happiness and were held void at common law in the great case of Monopolies, decided during the reign of Queen Elizabeth." After

pointing out the restrictive effect of the provisions of the act upon the rights of the people affected by it, he concludes: "It is to me a matter of profound regret that its validity is recognized by a majority of this Court, for by it the right of free labor, one of the most sacred and imprescriptible rights of man, is violated."

Justice Bradley thus states his agreement with Judge Campbell upon the question of National citizenship as defined by the Amendment, which he regards as one of vast importance, lying at the very foundation of the Government: "The question is now settled by the Fourteenth Amendment itself that citizenship of the United States is the primary citizenship of this country and that State citizenship is secondary and derivative, depending upon citizenship of the United States and the citizen's place of residence. . . . Every citizen, then, being primarily a citizen of the State where he resides, what in general are the privileges and immunities of a citizen of the United States? Is the right, liberty, or privilege of choosing any lawful employment one of them? . . . This seems to me the essential question before us for consideration. And, in my judgment, the right of any citizen to follow whatever lawful employment he chooses to adopt (submitting himself to all lawful regulations) is one of his most valuable rights and one which the Legislature of a State cannot invade, whether restrained by its Constitution or not." After an exhaustive discussion he says: "In my view, a law which prohibits a large class of citizens from adopting a lawful employ-

ment, or from following a lawful employment previously adopted, does deprive them of liberty as well as property, without due process of law. Their right of choice is a portion of their liberty; their occupation is their property." Answering Justice Miller's statement that the principal purpose of the Amendment was the protection of the rights of the negro, and confining it to cases in which his rights were abridged by State legislation, he says that "the Amendment was an attempt to give voice to the strong National yearning for that time and that condition of things, in which American citizenship should be a sure guaranty of safety, and in which every citizen of the United States might stand erect on every portion of its soil in the full enjoyment of every right and privilege belonging to a freeman, without fear or molestation." Justice Swayne "adopts the views" of Justice Field and Justice Bradley and submits others in support of them. Chief Justice Chase, "although he felt a great interest in the cases, [was] not able to prepare a dissenting opinion." [1]

The monopoly did not survive the period allotted to it by its charter. Upon the downfall of the reconstruction régime and the restoration to the people of the State of the right of self-government, a new Constitution was adopted giving to the municipal authorities power to provide for the public welfare without creating monopolies, and enabling them to restore to the people the rights, privileges, and immunities of which they had been deprived. An ordinance was enacted by the City Governing Board,

[1] Hart, A. B.: *Salmon P. Chase*, American Statesmen Series, 414.

restoring to the people the right to engage in business by complying with its rules and regulations. The Crescent City Slaughter-House Company resisted the enforcement of the ordinance, relying for the protection of its monopoly upon the contract clause of the Constitution as construed in the Dartmouth College case.[1] The District Court sustained its contention, but, upon appeal, the Supreme Court reversed the judgment, Justice Miller, again writing the opinion, resting the conclusion upon the principle that the Legislature could not, by any contract, limit the power of a succeeding Legislature to provide for the safety of the public health and public morals. The learned Justice adhered to the decision in the Slaughter-House cases, that the charter did not create a monopoly or abridge the rights of citizens of the United States. This aroused the opposition of Justices Field and Bradley, who wrote vigorous opinions in which they were joined by Justice Harlan, who had succeeded Justice Davis, and Justice Woods, who had succeeded Justice Strong, both of whom concurred in the majority opinion in the Slaughter-House cases. Justices Field and Bradley did not confine themselves to a restatement of their opinions that the charter created a monopoly, but again, and in stronger language, declared their adherence to the construction of the first clause of the Fourteenth Amendment for which they contended in the original case. It is interesting to note by what a narrow margin of judicial opinion the construction of the first clause of the Amendment became fixed

[1] 4 Wheaton, 518.

in the jurisprudence of the country, notwithstanding the criticism which it encountered. If Justice Harlan instead of Justice Davis had sat, the decision would have been with Judge Campbell. The same is true as to Justices Woods and Strong.[1]

Whatever may be thought of the conclusion reached by the majority of the Justices in the Slaughter-House cases, there can be no doubt that it was disappointing to those who framed and secured the adoption of the Fourteenth Amendment. Senator Boutwell, who had been a member of the Committee on Reconstruction which framed the Amendment, said that the Court had "erred in holding that there were two classes of rights — National and State"; and Senator Howe declared that "the American people would say, as they had said about the Dred Scott decision, that it was not law and could not be law." [2]

Mr. Blaine says that, by the decision, "the Amendment has been deprived, in part, of the power which Congress intended to impart to it." [3] Mr. William D. Guthrie thinks that the opinion delivered on behalf of the majority of the Court went beyond what was required for the decision of the cases, "and expressed a very narrow view of the scope of the Amendment; that the broader views contained in the dissenting opinions embodied a much truer statement of its purpose and scope." [4]

[1] 111 U.S. 746; Butchers' Union Co. *vs.* Crescent City, 60.

[2] Flack, H. E.: *The Adoption of the Fourteenth Amendment*, 266, 269.

[3] *Twenty Years of Congress*, II, 419.

[4] *The Fourteenth Amendment*, 20.

Professor John W. Burgess very much more strongly criticizes the decision and expresses "perfect confidence that it will be overturned." [1] Referring to this and the Cruikshank Case,[2] Mr. Charles W. Collins says that they "marked the practical overthrow of the Congressional idea of the Fourteenth Amendment within seven years after its victorious adoption.[3]

Mr. J. Randolph Tucker, in his argument in Spies *vs.* Illinois,[4] expressed with approval the view urged by Judge Campbell, as did Mr. John G. Johnson and his associates in Twining *vs.* New Jersey,[5] wherein they insisted that the construction of the first clause is "still an open question." Professor Charles A. Beard is correct in saying that "there is plenty of evidence to show that those who framed the Fourteenth Amendment and pushed it through Congress had in mind a far wider purpose than that of providing a general restraining clause for State Legislatures." [6] It is probable that Justice Moody, in Twining *vs.* New Jersey, correctly stated the effect of the opinion of Justice Miller upon the construction of the Amendment, and if not the controlling, at least, the persuasive reason for its adoption. Justice Moody says:

"There can be no doubt, so far as the decision in the Slaughter-House cases has determined the question, that the civil rights sometime described as

[1] *Political Science and Comparative Constitutional Law*, I, 225.
[2] 92 U.S. 542.
[3] *The Fourteenth Amendment and the States*, 22.
[4] 124 U.S. 131 (150).
[5] 211 U.S. 78.
[6] *Contemporary American History*, 55.

fundamental and inalienable, which before the war amendments were enjoyed by State citizenship and protected by State Governments, were left untouched by this clause of the Fourteenth Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this Court. Undoubtedly, it gave much less effect to the Fourteenth Amendment than some of the public men active in framing it intended and disappointed many others.

"On the other hand, if the views of the minority had prevailed, it is easy to see how far the authority and independence of the States would have been diminished by subjecting all their legislative acts to correction by the legislative, and review by the judicial, branch of the National Government. . . . This part, at least, of the Slaughter-House cases has been steadily adhered to by this Court. . . . The distinction between National and State citizenship and their respective privileges there drawn has come to be firmly established."

While, as said by Judge Campbell, indulging in the retrospection of retirement, "it was probably best for the country that the case so turned out," it is difficult to suppress the thought that the majority of the Court were, to some extent, and perhaps unconsciously, affected by the fact that, although intended to secure the citizenship of the newly enfranchised negro and immunity from abridgment of his civil rights by those who had lately held him in slavery, the language was sufficiently comprehensive, unless restricted, to "find that no such results

were intended by Congress which proposed the Amendment, nor by the Legislatures of the States which ratified it."

Justice Miller overlooked, or laid aside, the fact that, when the Amendment was framed and pressed to ratification, the majority in Congress and in the dominant sections of the country were determined to bring about that result, at least as to the Southern States, which they then regarded, and intended to hold, as "conquered provinces." When, however, the Amendment was brought before the Court by those invoking an application, entirely different from what was anticipated, they realized that the language of the Amendment to the Constitution was capable of being given more permanent and larger application than its authors intended. The pendulum had begun to swing backward, and the integrity of local self-government was resuming its former importance. Justice Miller regarded his opinion in the case as a valuable contribution to the preservation of the constitutional relation of the States to the Federal Government, and correctly so.[1]

Senator Conkling later insisted that it was within the purpose of the Committee which framed the Amendment to include others than negroes. Referring to some of the undesirable, if not unexpected, results of adopting the National theory of citizenship, Justice Miller says that, while the arguments drawn from the consequences urged against the adoption of a particular construction of a statute or

[1] Stern, Horace: *Great American Lawyers*, VI, 541; Justice Miller: *Address*, Centennial, University of Michigan (1887), 118.

constitution is not always conclusive, in this instance such consequences are so serious and so far-reaching that the argument has an irresistible force. Fortunately those who differed from his conclusion found nothing in the political or sectional attitude of the Justices upon which to base their criticism, other than an honest difference of opinion. Justice Miller and Justice Bradley represented the most pronounced nationalistic school of thought, whereas Justice Chase and Justice Field were of the moderate State-Rights school.[1] Justice Clifford, who went with the majority, was a Democrat, while the others were Republicans and Justice Swayne, who went with the minority, was a Republican. The South, supposed to be most directly interested in the question involved, had no representative on the Court. Justice Miller's prophecy that no action of a State, not directed by way of discrimination against the negroes as a class, would be held to come within the purview of the Amendment, has not been realized. Mr. Collins, with much industry, has collated the cases which, up to 1912, had been before the Court involving the construction of the Fourteenth Amendment, finding that of more than six hundred, only twenty-eight involved racial rights of the negro.[2]

A study of the cases found in the Supreme Court Reports tends to sustain the suggestion of a law-

[1] Stern: *Great American Lawyers*, VI, 541; Pomeroy, *ibid.* VII, 1; *ibid.* 53; Hart: *Salmon P. Chase*, American Statesmen Series, 67.

[2] Collins, C. W.: *The Fourteenth Amendment and the States*, 139; Bailey *vs.* Alabama, 219 U.S. 219.

yer, made in the argument of a case before the Supreme Court of North Carolina, referring to the Fourteenth Amendment, that it was made "for the protection of the negro, but has become the asylum of the multi-millionaire."

It is doubtful whether any new contribution has been made to the construction of the first clause of the Amendment since Judge Campbell's argument and the opinion in the Slaughter-House cases. As said by Justice Miller, while the decision did not meet the approval of four out of nine Justices, and although there were intimations that in the legislative branch of the Government the opinion would be reviewed and criticized unfavorably, no attempt to overrule or reverse the case has been made.[1]

It is one of many illustrations afforded by our constitutional system of government, in which language supposed to be clear and explicit, when used by the legislative department, is found to be obscure and capable of differing constructions by the judicial department. Senator Edmunds, who took part in formulating the Fourteenth Amendment, said: "There is no word in it that did not undergo the completest scrutiny. There is no word in it that was not scanned, and intended to mean the full and beneficial thing it seems to mean. There was no discussion omitted; there was no conceivable posture of affairs to the people who had it in hand which was not considered."[2] And yet it was found, upon the

[1] Justice Miller: *Address*, Centennial, University of Michigan (1887).

[2] Guthrie: *The Fourteenth Amendment*, 25.

first attempt to enforce its first clause, after two arguments by such lawyers as Jeremiah S. Black, Matthew H. Carpenter, John A. Campbell, and J. Q. A. Fellows, that the Court, by a division of five to four, radically differed in respect both to the intention of the framers and the construction of the language used by them.

CHAPTER IX

LAST YEARS AT THE BAR

In Jackson *vs.* Ludeling,[1] Judge Campbell, associated with Judge Spofford, successfully resisted the consummation of what Justice Strong characterized "a great wrong, perpetrated by the agency of legal forms." The case reveals a series of transactions, by which a holder of a claim of $720, in confederation with the officers of a railroad company and an attorney of the Court, by means of fraudulent combinations and suppression of bidding, succeeded in securing title to a railroad for fifty thousand dollars in the construction of which two million dollars had been expended and for which the defendants were offered immediately after the sale one million dollars. Justice Strong, following Judge Campbell's argument denouncing the methods resorted to by the defendants in acquiring the property, said: "The forms of law were scrupulously observed. But they rely upon faithlessness to trusts and common obligations, upon combinations against the policy of the law, and fraudulent, and upon confederate and successful efforts to deprive them wrongfully of property in which they had a large interest, for the benefit of persons in whom they had a right to place confidence."

As said by the Justice in his exposure of the fraud: "It is necessary to a thorough understanding of the case, to consider the relation in which many of the

[1] 21 Wall. 616.

purchasers at the sale, who are the present defendants, stood to the complainants, and how far their conduct was consistent with that relation. . . . It is impossible to sustain such a transaction. Throughout it was grossly inequitable. That the property was sacrificed by means of an unlawful and widespread combination is abundantly proved, and that the directors who were parties to it, and who became the purchasers, were guilty of an inexcusable violation of confidence reposed in them, admits of no doubt. Ludeling, it is true, was not a director, but he was a leading member of the combination and its chief agent in carrying out its plans. He knew its purposes. He knew its illegality. He had negotiated the surrender of Horne with full knowledge of Horne's breach of trust. . . . Indeed, Ludeling appears to have had complete possession of the sheriff. . . . The defendants can take nothing from such a sale thus made. Were we to sustain it, we should sanction a great moral and legal wrong, give encouragement to faithlessness to trusts and confidence reposed, and countenance combinations to wrest by the forms of law from the uninformed and confiding their just rights."

At the time this opinion was delivered, the defendant Ludeling was Chief Justice of the Supreme Court of Louisiana, having been appointed by Governor Warmouth. At the end of his term, 1877, he was reappointed by Governor Kellogg, but was overthrown in January, 1877, in the downfall of the corrupt administration and the restoration of honest government.

Referring to Judge Campbell's argument, it is said: "His attack was upon the foreclosure, under executory process of the civil law of Louisiana, of the railroad. He destroyed the title of Ludeling and his associates. He overwhelmed the defendants and drove them before him. . . . It was a State-famous litigation, and the excoriation of his argument is somewhat reflected in the Court's opinion; he won it justly. But aside from the private interest he rendered an equally great and timely public service." [1]

The Court set the sale aside, ordered the defendants to restore the property to the owners, and directed an accounting. A number of novel and interesting questions were presented on the accounting, resulting in further appeals. In Jackson *vs.* Ludeling, in which Campbell appeared for Jackson,[2] the Court disallowed a large number of bonds which were never issued by the officers of the corporation, but in an incomplete condition were seized and carried away, during the Civil War, by soldiers and sold in the market. It was held that enough appeared on the face of the bonds, in connection with the price at which they were sold, to put the purchasers upon notice of their invalidity. The railroad remained in the possession of the defendants for several years subsequent to the fraudulent purchase, and upon the accounting they made claim for improvements or ameliorations. The questions were decided according to the provisions of the Louisiana Code,

[1] Letter of Henry P. Dart; Lonn: *Reconstruction in Louisiana*, 304, 485.

[2] 99 U.S. 434.

which "is based upon the civil law, not precisely as laid down in the compilations of Justinian, but as interpreted in the jurisprudence of France and Spain: and had some peculiar rules on the subject." This controversy invited Judge Campbell into a favorite field of jurisprudence. His argument abounded in quotations from Pothier, Savigny, Demolombe, and other civilians. In conclusion he thus describes the conduct of the defendants, referring to their claim for ameliorations: "The owners and builders of them possessed in bad faith. They knew of the adverse title; they knew of the imperfections of their own; there may have been contrivance, counsel, combination, rapid movements to acquire possession tortiously surprising the uninformed and the unsuspecting: there may have been, at the time, contagion of disorder, a malaria of covetousness, stimulating men to an appropriation of the property of others for the uses of a combination."

By reason of the character of the property upon which the improvements were made, it was difficult to apply the provisions of the Code, enacted in 1808 and 1825, providing for improvements made upon "plantations, constructions, and works" by a person wrongfully in possession, nor was much aid derived from the decisions of the State Court. Justice Bradley, after an exhaustive and interesting discussion, concludes: "We have proceeded on the principle of carrying out the spirit and equity of the law, where it cannot be carried out in the letter." Justice Field, however, dissented, putting his objection to

the allowance to the claim for improvements upon the ground that the defendants were not in possession as *bona fide* claimants. He says: "I know of no law and no principle of justice which would allow defendants anything for expenditures on property they wrongfully obtained and wrongfully withheld from the owners, who were constantly calling for requisition. Why should the owners pay for expenditures they never ordered or for construction of works they never authorized? The defendants knew all the time the vice of their title. They knew they were not possessors in good faith; they concocted the scheme by which the fraudulent sale was made; and this the Court has so adjudged. . . . The learned counsel for the appellants who argued this case showed, I think conclusively, by reference to numerous adjudications and approved text writers, that the civil law in Europe and in Louisiana draws the same line of demarcation between the possessor in good faith and the possessor in bad faith in allowing for improvements and expenditures on the property of another. . . . I prefer in this case to stand by the ancient law, than to follow any new doctrines supposed to arise out of the character of railroad property. To me it seems that the peculiar character of that property requires the special application of the old law; for just in proportion to the value of this property is the temptation to get possession of it, and if plunderers can, when compelled to restore it, be allowed for their expenditures and alleged improvements, there will be an added incentive to plunder."

In this appeal Judge Campbell and Judge Spofford were, as in the Slaughter-House cases, opposed by Jeremiah S. Black and Matthew H. Carpenter. Ludeling, having by the "Revolution of 1877" lost his seat on the Bench, appeared also for the defendants.

The effort on the part of several of the States to invoke the original jurisdiction of the Supreme Court of the United States to enforce payment by the State of Louisiana of interest on her bonds, brought to Judge Campbell the opportunity to make what is regarded as his greatest argument upon the construction of the Constitution, defining and limiting the power vested in the judicial department in controversies wherein the States were parties.[1]

The Legislatures of New Hampshire and New York enacted statutes, enabling any citizen holding bonds issued by a State, upon which the interest had not been paid or the principal money was due, to assign to the State such coupons or bonds. The statute directed the Attorney-General of such State, upon the deposit of the bonds or coupons, with a sum sufficient to cover the costs incurred, to bring suit or proceeding in the name of the State, to enforce the payment of the coupons or bonds, in the Supreme Court of the United States, and to employ counsel to prosecute such suits. No cost was to be paid or expense incurred by the State. Counsel fees were to be paid from the recovery. The Attorney-General was directed to pay over to the assignor of

[1] Art. III, Section 2, and the Eleventh Amendment. New York and New Hampshire *vs.* Louisiana, 108 U.S. 76.

such bonds or coupons all sums recovered, after paying the cost and expense of the litigation.

Pursuant to the provisions of these statutes, citizens of New York and New Hampshire assigned coupons for interest on bonds issued by the State of Louisiana, and original bills in equity were filed in the Supreme Court to enforce their payment. Wheeler H. Peckham, David Dudley Field, William A. Duer, and Leslie W. Russell, Attorney-General, represented the States of New Hampshire and New York. John A. Campbell and J. C. Egan, Attorney-General, represented Louisiana. Judge Campbell insisted that the immunity of the State from suit was an incident to sovereignty and had existed since the Declaration of Independence, during the Confederation of the United States. He said: "This immunity ought not to be evaded, nor infringed by any indirection, collusion, contrivance, simulation, or fiction in modes of judicial procedure, but should be maintained in the exactness of the letter and fullness of the spirit of the Constitution."

Following a statement of the general principles upon which the constitutional status and the reserved rights of the States are based, he says: "The State administration within this range may be carried on as independently as if the Government of the United States did not exist. The power of taxation, with the auxiliary and consequential power of assessment, collection, preservation, and appropriation of the monies arising from taxation, extends to all the property within the State which exists by its authority or was introduced by its permission."

Defining the character of the controversies between the States contemplated by the makers of the Constitution, of which jurisdiction was conferred upon the Supreme Court, and denying the power of a State to acquire by assignment such a controversy with a sister State, he says: "It is only by their consent that controversies between two or more States are subject to the determination of this Court." That, "as this consent is the only cause of jurisdiction, and the consent is confined to a single and distinct class of political and judicial persons, all of whom are associated under an organic law which determines their relations and intercourse, this jurisdiction cannot be extended to include controversies which did not originate in some lawful intercourse or connection of the one State with the other who are parties, and cannot include demands acquired by assignment and growing out of intercourse to which the States were not parties and have not direct and immediate interest."

He gives an interesting history of the origin and formation of the article and section of the Constitution defining the jurisdiction of the Federal Courts, calling attention to the fact that of the Committee of the Convention of 1787, appointed to draft and report a form of the Constitution, Rutledge and Ellsworth became Chief Justices, Wilson an Associate Justice of the Supreme Court, and Randolph the first Attorney-General. He quotes the language of Hamilton in the "Federalist," and refers to the debate in the Virginia Convention which ratified the Constitution, noting the criticism of the article

by George Mason and Patrick Henry and the answer by John Marshall and James Madison, to their apprehension that, by its terms, a State was made subject to a suit by an individual. He urges: "The contemporary exposition, which is esteemed so strong and trustworthy in the determination of the true intention of the authors of a law or constitution, leaves little doubt on the subject. The general opinion was a State could not be sued without her consent. This opinion was inculcated by the most prominent supporters of the Constitution."

He discusses the "disturbance made on this subject," by the decision in Chisholm *vs.* Georgia,[1] the numerous protests which followed the decision, and the action of John Hancock, Governor of Massachusetts, and his successor, Samuel Adams, resulting in a special session of the Legislature and the passage of resolutions, instructing the Senators and Representatives to "adopt the most speedy and effectual measures in their power to obtain such amendments to the Constitution as will remove any clause or article of the Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any court of the United States."

This is followed by a history of the introduction, by Caleb Strong, of Massachusetts, of the resolution which was adopted as the Eleventh Amendment. It is interesting to note, as evidence of the care with which the power to sue a State by an individual was negatived and the danger of judicial

[1] 2 Dall. 419.

construction to the contrary excluded, that, whereas the resolution as introduced simply declared that the judicial power of the United States "shall not extend," it was so amended as to ordain that such power "shall not be construed to extend." [1] All other amendments were rejected by large majorities, and the resolution was adopted in the Senate by a vote of 22 to 2, and in the House of Representatives by 81 to 9.

Having discussed the general constitutional question, Judge Campbell proceeds to deal with the instant case, saying: "The General Court of New Hampshire seems disposed to employ this Court with the grievances that her citizens may have or shall acquire in commercial intercourse with any State of the Union, or with the citizens of any State of the Union in which the State may be chargeable. The Court only requires an assignment of the right to complain and accordingly a complaint will be made as the assignor directs."

He treats the "assignment" of the coupons to the State, for the avowed purpose of conferring upon it the right to sue, as a mere fiction, saying: "Men have actually been made to regard fictions as apt and necessary to good government in general and good judicature in particular. That fiction debases the intellectual and mental frame of all those upon whom the imposture passes, and by whom the falsehood uttered in place of a reason, is accepted as constituting a reason and that a sufficient one; and

[1] Braxton: "The Eleventh Amendment," *Journal, Virginia Bar Association* (1907), 185.

when employed by a judicial functionary the evil is greatly aggravated. . . . Commentators, historians, and moralists have complained of the abuses in the jurisprudence and procedure of the English courts and have expressed condemnation of the usurpations of the courts and of their tolerance of falsehood, ascribing to them a pernicious influence on the probity of lawyers, the dignity of the court, and addition to the delays, expense, and uncertain results of judicial proceedings, the encouragement of pettifogging, and the contamination of justice itself, which is inseparable from truth. . . . It can hardly be charged upon the authors of the Constitution that they had a design to encourage any duplicity or to promote opportunities for disguise or indirection. The citizens of the United States were all brought into immediate contact with the authority, and were secured in the protection of the United States, by the Constitution. A leading and controlling principle of the new Constitution was the discarding of intercessors, mediators, or procureurs between the people and the Government otherwise than as representatives duly chosen. . . . The result of the inquiry we have made shows that the immunity of sovereigns from civil suits, unless when they consent, is universally enjoyed, and that the States of the Union from the time of their Declaration of Independence have asserted and enjoyed this immunity, except in cases of controversies with one another in respect to their boundaries and jurisdiction. There is no instance of a suit commenced on a contract, the performance of a debt or duty. The

claim made in this bill when fully considered is that there is no power, privilege, immunity, or right of a State which may not be subordinated to a judgment or decree of this Court at the suit of another State, and there is no restraint upon one State from acquiring, by contract or convention, causes of suit against another State, the effect of which will be to change the Union of the United States into a Republic like that of France, composed only of departments, cantons, and communes. . . . A vast change would take place, not only in the Court but in the Government. A transformation from analogous conditions occurred in the mediæval epoch, both in England and France, in the contest of the monarchs with the feudal chiefs and with the Church. Guizot tells us how the lawyers became efficient and admirable instruments in the hands of royalty, and that with regard to government in general and judicial affairs in particular, they established principles contrary to liberty. So, De Tocqueville admonishes such sovereign jurisdictions to control their centralizing proclivities and the ambition of fixing novel desires and fanciful expectations that are diffused among the people upon themselves, by making their rule too attractive and advises that the safe and honest line of conduct is to advise their subjects to take care of themselves." He insists that the "contract must be understood in the sense which accords with the public order among the parties, when and where it was made, and with their maxims of law and the order of their jurisdiction. The bonds in suit were issued by the

authorities of the State of Louisiana when there was a condition bordering on anarchy and civil war and which continued for some time afterward. When issued their market value was not more than one half of the sum for which they were given. The holders knew that there was no coercive power to enforce their payment. Every purchaser invested under a hope of exorbitant profit and this profit was the evidence of hazard. . . . It can hardly be supposed that the clause in the Constitution under consideration was inserted to enable a State to secure for her citizens the profits they hoped to make by adventures in depreciated securities of States at the Stock Exchange."

Mr. William A. Maury says: "Judge Campbell displayed the same remarkable ability and research as he had shown in the Slaughter-House cases some years before (1872). He left nothing to be said or desired, on the rationale of the governmental exemption from suit. I may say, without the slightest impropriety, I hope, touching his argument in those cases, that I heard a member of the Court before which they were argued, who was not, however, one of its members when the Slaughter-House cases were before it, say that Judge Campbell's argument in the Louisiana cases was the greatest he had heard since he was a member of the Court." [1]

Senator Gibson, who met at a dinner in Washington, the Justices of the Supreme Court, wrote that Justice Horace Gray said that the argument made by Judge Campbell, the day before, in the Louisiana

[1] *Memorial Addresses — Justice Campbell.*

case was "the greatest he had listened to in his life. That he had been Chief Justice of Massachusetts eighteen years and had never listened to such a profound argument as that of Judge Campbell." Justice Miller, who was present, concurred with Justice Gray, and Chief Justice Waite said that it was the greatest argument he had ever heard in a court of justice. Justices Field and Blatchford concurred in this estimate of Judge Campbell's argument.[1]

Mr. Bancroft wrote, "I know not whether to admire it most for its exposition of the Constitution, or its general ability and truth-seeking thought." The Honorable Thomas J. Semmes said: "I heard the argument. The courtroom was crowded with distinguished auditors. The Court and audience listened with rapt attention to the great lawyer, as he demolished, one after another, the propositions of his antagonists. . . . His splendid, luminous argument, which for erudition, research, breadth of view, political and historical knowledge and constitutional lore surpassed any I ever heard." [2]

Judge Campbell regarded his argument in this case as the culmination of his professional efforts and the result the great achievement of his life-work, the maintenance by the Supreme Court of the immunity of the States from suit without their consent as inherent in their political sovereignty. The bills were dismissed, Chief Justice Waite, writing the opinion, sustaining Judge Campbell's position. While the attempt to bring States before the

[1] Washington correspondent, *New Orleans Picayune.*
[2] *Memorial Addresses — Justice Campbell.*

Court, through the medium resorted to in these cases, has not been repeated, the contentions, by Judge Campbell, that such a claim was not within the constitutional grant of power to sue a State and that causes of controversy could not be acquired by another State by assignment, were rejected in South Dakota *vs.* North Carolina.[1] Justice White strongly dissented from this decision, in which he was joined by Chief Justice Fuller and Justices McKenna and Day.

In the Tennessee Bond cases,[2] Judge Campbell, representing several of the railroad companies, parties to the litigation, was associated with a number of the most eminent lawyers of the country representing other companies. The controversy involved large interests and presented a number of novel and interesting questions. Judge Campbell's printed arguments for the several companies which he represented contain exhaustive discussion of the facts and quotations from American, English, and Continental decisions and textbooks, including the Institutes of Menu. Referring to his association with Judge Campbell in these cases, Judge George Hoadly said: "I know him well as the defeated knows the conqueror, for in two of the most memorable cases of my life I was the captive of his bow and spear."

Judge Campbell was of counsel for defendant in the case of Stone *vs.* Farmers' Loan & Trust Company, reported, together with several other cases relating to the same subject, as the "Railroad Com-

[1] 192 U.S. 286. [2] 114 U.S. 663.

mission Cases." [1] This litigation grew out of the movement in the Southern and Western States to control through the medium of commissions the operation of railroad companies, especially in fixing rates of charges for freight and passengers. The questions discussed in the argument and decision of these cases, although at that time unsettled and of far-reaching importance, have, by a series of decisions, passed into the history of our State and National jurisprudence. Judge Campbell, as was his custom, discussed the questions presented from every viewpoint. In maintaining the primary proposition that the right to fix tolls and rates was vested in the corporation by its Charter, and removed from the regulative power of the Legislature by the contract clause of the Constitution, as construed in the Dartmouth College cases, Judge Campbell, to some extent, encountered the principle for which he contended in his dissenting opinions in Bank *vs.* Knoop and Dodge *vs.* Woolsey. While in this series of decisions, beginning with Munn *vs.* Illinois,[2] the Dartmouth College case has not been overruled, the Court has, by expanding the principles of the common law subjecting public service corporations to legislative control, very materially narrowed its scope and restricted its effect. The legislation giving expression to the demand of the people for fair rates and reasonable facilities for transportation of freight and passengers, enforced by the decisions of the Court, constitutes one of the most interesting and important chapters in our National life. The danger,

[1] 116 U.S. 307. [2] 94 U.S. 113.

of which Judge Campbell gave warning in his dissenting opinion, of the effort of corporations "to ignore the fundamental laws and institutions of the State and to subject the highest popular interest to their central boards of control," had been realized. The power reserved to the legislatures of the States to control public service corporations and confine them in their operations to reasonable regulations, is now firmly established in our jurisprudence. It has passed beyond the field of controversy, but at the time of the argument and decisions of the "Railroad Commission Cases" many questions in respect to the existence of the power and the manner and extent of its exercise were unsettled and exceedingly doubtful.

In Memphis & L. R. Railroad Co. *vs.* Southern Express Company,[1] decided and reported together with a number of other cases involving the same question, known as the "Express Company Cases," Judge Campbell was associated with Clarence A. Seward and George F. Edmunds. The controversy grew out of the effort of the express companies to compel the railroad company to extend to them facilities for conducting their business. The litigation was instituted in the Circuit Court by suits in equity, seeking mandatory injunction commanding the railroad companies to perform their duty to the complainants. They were heard by Justice Miller and the Circuit Judge sitting in the Circuit Court, where decrees were made granting the relief demanded. On appeal, the decrees were reversed.

[1] 117 U.S. 1.

Judge Campbell, in his brief, gives an extended and enlightening history of the origin and growth of the business of common carriers, both freight and express, in France and England. His citations and quotations from the decisions of the courts of these countries constitute a fund of learning exhibiting vast amount of labor of investigation and reflection. To the student interested in the development of the various systems of transportation and the effort on the part of the people through the lawmaking department and the courts to control, without destroying, these essential agencies in the growth of modern life, the briefs prepared in these cases by the great lawyers who aided the courts are of permanent value; they are great storehouses of information and learning. Of necessity, the opinions of the courts are abridged condensations of the arguments of lawyers.

Justice Miller dissented from the conclusion reached by the majority of the Court. He said that "three years' reflection and the renewed and able arguments in the Supreme Court" had not changed his opinion. Referring to the ultimate outcome of the decision he said: "I am very sure such a proposition will not long be acquiesced in by the great commercial interests of the country and by the public whom both railroad companies and the expressmen are intended to serve." Justice Field concurred in the dissent. In these cases Judge Campbell was opposed by Judge John F. Dillon, Sidney Bartlet, and other lawyers of national reputation. The controversy, like that relating to rate-making and other

questions involving the contest for governmental control which agitated the people, the legislatures, and the courts, has been, to a large extent, removed from judicial to administrative agencies, State and National.

Judge Campbell argued, after he had passed his seventieth year, a number of his most important and difficult cases. His briefs in these cases exhibit an undiminished capacity for labor and thoroughness of preparation. The Tennessee Bond cases and Louisiana Gas Company *vs.* Louisiana Light Company were argued by him at the October Term, 1884.[1] The Express Company cases and Wright *vs.* Kentucky and Great Eastern Railroad Company [2] were argued at the October Term, 1885, when he had reached the age of seventy-four years. He had lived to realize his ideal of professional life — six cases a year in the Supreme Court with ample time for preparation. At that time he had retired from general practice.

The Louisiana Gas Company case was of great importance to the people of New Orleans, being the result of a long and hotly contested litigation for the privilege of furnishing lights to the city and citizens. It began with the "Attorney-General on the relation of the Crescent City Light Company *vs.* The Louisiana Gas Company." [3] In his brief in this case Judge Campbell expresses indignant protest against the attempt by the Attorney-General to nullify an act of the Legislature, enacted many years before, granting the franchise to the defendant company,

[1] 115 U.S. 650. [2] 117 U.S. 1–72. [3] 27 La. Ann. 138.

for the benefit of a new company of questionable origin. He insists that the Attorney-General, on behalf of the newly created corporation, has no right to attack the validity of the original corporation, saying: "We do not perceive that the Attorney-General has brought before the Court any parties interested in the act or bound by it. We do not see that any parties at all be necessary if the Attorney's pretensions be admitted. We have sought in vain for any precedent for the judicial nullification of a statute of the Legislature."

Referring to the course pursued by the Attorney-General and the standard of morality then prevailing in official circles in the State, he says: "It is rarely that men have been willing to incur the reproach of attempting to involve a State in so disgraceful and discrediting a breach of public faith and public honor as the present. Some of the cases arising under legislative acts. lately passed, which I have examined, resemble those cases of *crimen falsi* where captains or mates combine to cast away the ship, cargo, and seamen to get the insurance money for themselves — faith, duty, obligation, the world's estimation, the approving conscience, all go to the depths together with the property they should have taken care of, even to the surrender or sacrifice of their own lives. These people have a very imperfect and confined idea of the intrinsic majesty of the government and country they belong to, and if the fact be that life or property be insecure in this State it is due to those whose sacred duty it has been to protect both. . . . In the year 1870 a

band of adventurers caused to be passed, in the manner that such acts have been notoriously passed, before and since, an act entitled, 'An Act to Incorporate the Crescent City Gas Light Company.' The duration of this charter is fifty years from and after the date of the expiration of the charter of the New Orleans Gas Company. The monopoly which was discontinued by the Act of 1860, this band has caused to be granted to them. . . . When the Attorney-General presumes to say that the State of Louisiana has an interest in breaking its faith, repudiating its contracts, dishonoring its name by resorting to a quibbling plea, we feel bound to express a decided and emphatic dissent. . . . In the stock of this [defendant] corporation is reposed the property of the widow and the orphan. Brothers have given it to unprovided sisters. Mothers and fathers have bought it for the support of their young daughters. The object of this suit is to make these deposits a spoil and a booty for the greedy, the depraved, and corrupt." While this is strong language to be addressed to the Supreme Court concerning the Legislature and the Attorney-General, it would seem that existing conditions in Louisiana justified it.[1] The Supreme Court sustained the action of the Attorney-General of Louisiana.

In New Orleans Gas Light Company *vs.* Louisiana Light Company, Judge Campbell was more successful in protecting the rights of the old company than he had been in the State Court.[2]

[1] Lonn: *Reconstruction in Louisiana*, chap. II. [2] 115 U.S. 650.

CHAPTER X

PERSONAL CHARACTERISTICS, INTELLECTUAL AND SOCIAL TRAITS

Judge Campbell inherited from his Highland Scotch ancestors a strong physical constitution and an almost in exhaustible capacity, coupled with a passion for labor. We have given a description of his appearance and manner in his young manhood. A distinguished lawyer and publicist who, in his earlier years residing in Mobile, saw much of Judge Campbell, gives the impression which he made upon himself and others. He says: "When he came from New Orleans to Mobile, as he often did after the Civil War, the people would gaze at him as he passed along the streets. His personal majesty overcame you — it was almost oppressive, even when he was most friendly. His power to labor was prodigious, his physical endurance was fortified by absolute temperance in all things." [1]

Another, who knew him well during his residence in New Orleans, said: "He worked hard in his profession, because he loved knowledge. He was a great reader of books, new books, ancient history, fresh literature, and modern thought. . . . Work constituted his happiness. When it was over he rested. He was serious, sometimes imperious. In the Courts he was best known. When he would go there he would go with the spirit of a gladiator, honorably, but fiercely, to contest for the prize." [2]

[1] Letter from the Honorable Hannis Taylor.
[2] *Memorial Addresses — Justice Campbell.*

His success came as the reward of patient, laborious industry. He went to the bottom of every question with which he was called upon to deal and exhausted every resource to sustain his conclusions. Mr. Maury, referring to his capacity for labor in the last years of his practice, said: "He has sometimes playfully confronted me with the evidence of his tremendous industry, as if to say that researches that appalled younger men had no terrors for him. It was mainly by labor, incessant labor, that he stood first at the Bar." [1]

Mr. William D. Guthrie, with whom Judge Campbell was associated in the preparation of the argument in the Railroad Commission cases, says that Judge Campbell expressed as his ideal of professional life, "to have six cases a year before the Supreme Court of the United States and plenty of time to investigate and prepare for argument. To him the administration of justice was a great science and to the elucidation of its problems brought an exceptionally well-filled mind and indefatigable labor." Chief Justice White, a young lawyer at the time residing in New Orleans, says: "I recollect very well hearing him argue the Slaughter-House cases and the impression left on me by that argument was that he was a book man of great reading. Time brought me some personal association with him and sowed the seed of a real personal affection which was germinated and never died." [2]

Mr. Henry P. Dart, of New Orleans, whose "legal christening began with the clerical labor" in the

[1] *Memorial Addresses — Justice Campbell.*
[2] From letter of Chief Justice White.

preparation of the argument in these cases, as a junior in the office of one of the counsel, gives an interesting personal incident from which we get an impression of Judge Campbell's appearance and manner. He says that one morning he met the Judge "sitting at the corner of Carondelet and Canal Streets, on the covered street hydrant, munching something, possibly an apple; he was 'batting' or 'beetling' his great eyebrows and evidently in profound thought, as was his habit. I never saw him when he did not appear to be abstracted from his surroundings. I spoke to him and he arose and put his arm in mine, and so we journeyed across the big street to wherever he was going. He began to talk to me, stating some legal problem as though he were thinking aloud, but every now and then stopping and lowering over me with outstretched arm and vocal inquiry, just as he would have emphasized a point in an argument. Of course I knew he was talking at me and not to me, and the only response expected was a word or two necessary to let him catch his breath. When I delivered him at his destination, the thinking man disappeared, and his courtesy returned with an expression of his happiness at the opportunity we had had together, and I may add, he said it as though he believed it. But as for me, it was sufficient for the day that I, a stripling at the Bar, had walked down that crowded thoroughfare arm in arm with the greatest lawyer of the time, engaged in a most profound and absorbing, though one-sided, discussion." [1]

[1] Letter from Henry P. Dart.

"He was a man of noble presence and, until his powers began to fail with increasing age, of great physical power. His tall form, his dignified and impressive presentment, called for immediate respect, even before the weighty argument required assent." [1]

While visiting Louisville, Kentucky, on professional business, he was described by a newspaper correspondent as a man of "Scotch physiognomy, toned down after two or three generations of American civilization. He has a fine head, partly bald, and encircled with soft, white hair. He is quiet and deliberate in speech, with a musical voice."

The Washington correspondent of the "Philadelphia Record" describes his appearance at the time he argued the case of New Hampshire *vs.* Louisiana: "The man who made the argument was John A. Campbell, of New Orleans. He was a member of the Supreme Court of the United States when the most famous of its present members were unknown. He held his place until the war broke out, and then he left the Union and the Bench, with his State. He reappeared after the war as a member of the Supreme Court Bar, with a remarkable practice even for that Bar, of large practice and great fees, and has stood in the front rank ever since. He is a very old man. His form is thin and bent, his skin is in the parchment state, and his hair is as white as the driven snow; but a great mind looks out through his keen eye and a great soul controls his fragile body. He is a lawyer to the core — in some respects one of the

[1] *Memorial Addresses — Justice Campbell.*

wisest, broadest, deepest, and most learned in the United States. He has neither the presence, voice, nor tongue of the orator, but when he speaks in his thin, measured tones, never wasting a word, the Supreme Court of the United States listens as it listens to almost no other man. Mr. Campbell is absorbed in his work. He has no eyes or ears for anything or anybody not immediately concerned in the case in hand. He lives quietly in New Orleans, surrounded by one of the finest law libraries, in all languages, in the world. He is a profound civil lawyer, with Justinian at his tongue's end, and, at the same time, a common-law lawyer, competent to battle with the best of that class. His memory is as wonderful as George Bancroft's. He apparently remembers every scrap of law he ever saw or heard, and he has his resources so classified and catalogued that he can bring them forth at will. . . . Once retained in a case, he becomes a recluse. When he emerges from his books, he has absorbed that case with all its bearings, either his own side or the other."

Judge Campbell's mind was sound, his fiber tough and his character robust. He was clear in his conceptions, but without imagination. His mind was massive rather than analytical. He was earnest of purpose and was loyal to client and friend. To many he seemed to have a supernatural power of insight and to be able to extricate the unfortunate from any difficulty. On one occasion a colored woman, to whom he had given money to purchase freedom for herself and family, when about to die, said to a good woman, "Put your trust in God and in Mr. Camp-

bell." He was a friend to the unfortunate, tender to children and women. No deserving person ever appealed to him for protection without receiving it. In his daily life he was frugal and simple, working continuously but quietly. He was always a great reader and accumulated a large library of both law books and general literature.

While there is no evidence that Judge Campbell indulged in humor or light conversation, we have the testimony of those whom he met in social relations that he was an interesting talker. Mr. Maury says that he had "in writing from one of the greatest living jurists" — then a member of the Supreme Court — his estimate of Judge Campbell, as "one of the most interesting persons I ever knew. Great in learning, far-reaching in thought, simple in manner, most instructive in discourse." [1]

Judge Hoadly, on the same occasion, said: "In the long discussions, which, beginning at Memphis, carried us to Mobile and finally here [Washington], I became his friend, and many an otherwise tedious hour during that association has he beguiled in high discourse of the fall of Richmond, in which city he remained the sole surviving representative of the Confederate Government after all others had fled; of the attempts at peace with Mr. Lincoln and Mr. Seward, at Hampton Roads, and of his services in this Court." Judge Hoadly gives an interesting account of a conversation in which Judge Campbell gave expression to his high estimate of Judge Curtis's service, not only in the opinions which he wrote,

[1] *Memorial Addresses — Justice Campbell.*

but of the counsel and advice he gave his associates in the Conference-Room.

"Any one who has heard him give his reminiscences of public men and the stirring events which happened in his time, will agree in respect to the charm of his conversation, with its admixture of humor, which latter a stranger would never have supposed to exist behind that cold, abstracted expression, which he generally wore in public." [1]

It is interesting to have Judge Campbell's estimate of some of the men of National reputation with whom he was, at times, associated. Of John C. Calhoun he said: "My father was an old friend of Mr. Calhoun and I had been brought up to admire him. When I went to see him at Washington, I appeared under the patronage of my father's name, and at this distance he appears to me to have been a man of interesting appearance and an intense form of address, and after a few lapses, he proceeded upon me with all the earnestness of one addressing a popular audience. He was more ardent than suited my years as compared with his, and, after he had talked with me, in the wildest way, for some time, I got the notion that he was practicing something upon me. Soon afterwards he delivered a celebrated speech in which I thought I recognized whole sentences as what he had declaimed to me, a mere young man. Mr. Calhoun was a man whose theories of government were never reasoned out from what he knew, but, in the privacy of his closet, *a priori*. He grew in love with these ratiocinations and was perfectly

[1] *Memorial Addresses — Justice Campbell.*

honest in his avowals of them, and they struck many good men in his time as true positions. He had the misfortune of having had the Presidency on the brain. No man ever had it worse. The loss of it gave a strange aspect to his later years and made him feel like one who had nearly won the imperial rule and had lost it. He considered all questions in the light of one who had been discrowned, and could magnify his experience as truly as if he had spent a long term of actual sovereignty. But his love of country under the aspects of his mind was as undoubted as that of men who kept in promise longer."

Of R. M. T. Hunter, he said: "Mr. Hunter had one of the finest minds in the South and one of the most honest and beautiful natures. You will recollect that he was never famous for the violence of his opinions, but sought, within his opportunities, to do the best for his people and give direction to the country under its old conditions according to the truest civilization of which he was capable. I have known him in captivity, when our misfortunes pressed equally upon us, and around us, and learned to love him. He has time enough on his side of the clock to be of some influence, and one of the speeches which he made during the last campaign was pleasing to me because it showed that he retained the vigor and health of his mind."

An interesting side-light is cast by Judge Campbell upon James M. Mason, accompanied by an incident which shows the kindly consideration for his wife. He says: "Mason's domestic life was peculiarly beautiful. He married the daughter of Colonel

Chew, who owned the mansion and ground where the battle of Germantown raged in the Revolutionary War. After Richmond was evacuated, I remained in the city until it filled up with the troops of the United States, and, as soon as I had a little repose, I set forth to inquire into the condition of my neighbors who remained. I went to the house of Mrs. Mason and she told me that she had destroyed in the grate fire all of the letters which her husband had written to her in the thirty years, or so, of their married life. In all that time, she said, that Mr. Mason was never out of her company a day but he wrote her a letter with punctuality, and when he was Senator in Washington the school exercises of his daughters were mailed to him every day in the week and were, by him, corrected and returned. Mrs. Mason had kept her husband's letters, but believing that the soldiers would ransack her house she had made the sacrifice of committing them to the flames. She had also destroyed many souvenirs, precious to her in a domestic way, but here was a sword given to her father by General Washington, which she desired me to take and conceal, for she thought her husband's house was more exposed to peril than my own. I was not very firm in my mind about carrying a weapon through the streets, but she solicited me so earnestly that I put the weapon under my cloak and, wrapping the cloak around me, walked through the city touched by the soldiers on almost every side. When I got home, I put the sword up in the top of the house among the rafters and kept it there until I could return it with safety."

Of William A. Graham he said: "Mr. Graham never was a friend of secession. . . . He is a man of the finest character, the finest nature and that sort of noble, gentle influence which is just now needed in the South. For him I feel a desire that he should be recovered to the country, and if it could be done at my wish I would have contributed something again to the restoration of the Union."

In one of his briefs he refers to Chief Justice Eustis of Louisiana as one "whose name is most honorably associated with the development of the science of jurisprudence in Louisiana — a judge of great learning and practical ability — a lawyer who preserved at the bar the candor, fair-mindedness, the love of truth, and the desire for justice which befits the judge."

Judge Campbell had a remarkable capacity for using strong, pregnant, and caustic language. This is evidenced by a few illustrations. In his argument before Justice Bradley, sitting in the Circuit Court in Wood *vs.* Howard (1871), he said:

"In the Eighth Circle of the Inferno is a place reserved for those people who traffic in the public interest for their own private advantage. Those whose 'no' is quickly changed to 'aye' for lucre have a place in the great circle, and maybe some of those who occupy the opposite ends of this Capitol, and have seats in the State Legislatures, shall find in the end some accommodation there. The Malebolge is a dark and dreadful lake of a thick glutinous mass which on every side belimes the shore and demons watch its wretched inmates with seething forks to

press them down, should they uplift their heads above the surface, so that if steal they can, it shall be out of view.

"This open, flagrant, public, shameless traffic, in acts of legislation, in corporate rights obtaining monopolies and exclusive grants of the public domain of various kinds, infringing the personal rights, the individual rights of men, by bribes and corruption, is the most frightful of all the circumstances that attend the present condition of society."

A lawyer sued for damages for the occupation and closing by a railroad company of a part of a street on which his office was located, alleging that he lost clients. Judge Campbell said: "The plaintiff was examined on his own behalf as a witness. He did not give testimony of a single client he had ever had, or he had ever lost. No lawyer but himself had ever had an office in that section of the city. No one had ever seen him attending a case in the courts. No custom or clientage has been withdrawn from him by any act of the defendants. His loss, as set forth in his pleading, is like some experiments on certain bodies which show a loss, or rather an apparent loss, of weight which they never had."

In the same case a number of owners of coffee-houses, saloons, restaurants, and lodging-houses testified to a diminution of their profits and rents. Judge Campbell said: "Father Matthew has not been so successful in suppressing intemperate drinking of poisonous liquors, if this testimony can be believed. The whole of this salutary effect is ascribed to these depots and yards."

Discussing an act of the Legislature prohibiting the courts from enforcing the collection of taxes, he said: "The General Assembly, to manifest the intensity of their purpose, proceeded to mutilate the jurisdiction of the judicial tribunals and pronounces an interdict on them in this remarkable language: 'It shall be hereafter incompetent for any Court to mandamus the officers of the City to levy and collect any interest tax (other than those provided in this Act), or in case of such mandamus by a Receiver or otherwise to direct the levy and collection of such tax.' Thus it is that 'Dishonor mangles true judgment and bereaves the State of that integrity which should become it; not having the power to do the good it would, for the ill which doth control it.'"

Again he says: "The Legislature and the Council both decided that a financial system which deferred payments so that instability, uncertainty, the chances, and peradventure the fraudulent manipulation of a lottery wheel were to determine who should be paid and what should be paid, was the best; that the old ideas of exactness, punctuality, and strict honesty had become obsolete and were not suited to the fashions of the day, nor to any habits of their own. . . . Fortunately for the country, such crooked wisdom denominated by Lord Bacon as 'cunning' was overruled in advance by the framers of the Federal and State Constitutions. By the Act of 1876 the Louisiana Legislature smites to the heart the contract made with the holders of the consolidated stock, and destroys at once the obligation of the contract and shuts all the avenues to the

Courts and deprives the Courts of all their motive power to afford redress. Jack Cade, assuming that the laws of England should only come from his mouth, and all past records must be burnt, seems to have been the model before their eyes. The Constitution and laws under it were regarded as cobwebs to be brushed away with their potential hands."

To permit the intervention of one bondholder he says would be "to ventilate his notions of municipal obligations and might convert the Court into a mass meeting for the manifestation of popular passions instead of being a place where justice is judicially administered." [1]

He thus describes what he foresees as the result of regulating railroads by the Government: "There would be a demand for railroad tracks that were horizontal and without curves, with Pullman cars and conductors, and the fulfillment of Jack Cade's promise that claret or other favorite beverages would flow in currents through conduits in all passenger coaches, and the fares placed at a mill a mile. This would be an approximation to a democratic way when the world would circulate at the cost of the world."

In his argument in New Hampshire *vs.* Louisiana, he said: "The Bill seems to assume that the States of the Union have been set at large to carry on a universal traffic, and that this Court has been specially appointed to facilitate their commercial operations; that the State is a corporation composed of individual traffickers; that the facilities of the State

[1] Louisiana *vs.* Pillsbury, 105 U.S. 278.

are for the use of these collectively or separately; and whatever right or interest one has, or will have, may be asserted in this Court in the corporate name. . . . The ubiquity and unity of the powers of the Court in the exercise of original jurisdiction; the absoluteness and ultimity of its judgments and decrees; the close relation of the Court with the other departments of the Government; the control of the place of its sessions, combine to render such a jurisdiction pleasant and alluring to suitors and attorneys. . . . It is a fact that, in respect to the twenty-two billion and a half dollars that the States of the world owe, there is no remedy by suit for the collection of any portion. I suppose there is not a suit pending for any portion, except this suit of New Hampshire *vs.* Louisiana for the sum of two hundred and ten dollars, and costs."

In Stone *vs.* Farmers' Loan Association he said: "The predominant opinion among statesmen and publicists is that the germinal point of all riches is to be found in the labor of men; and that the most sacred of all property is that right of a man to labor for himself. Slavery consists in the compulsion of one man to labor for another against his will and for the emolument of that other. The withdrawal from one man or an association, of their faculties, of their employment of strength, dexterity, address, or capacity, or to coerce their employment upon conditions to which they have not consented and to apply the proceeds to another, contravenes and conflicts with those assertions of right which are placed as a frontispiece to the American Constitution."

Describing the political conditions from which the Crescent City Slaughter-House Company derived its charter, he said: "The Fourteenth Amendment contemplated the adoption of what is called universal suffrage, and that has been compelled. The force of universal suffrage in politics is like gunpowder in war, or steam in industry. In the hands of power, and when the population is incapable or servile, power will not fail to control it; it is irresistible. Whatever ambition, avarice, usurpation, servility, licentiousness, or pusillanimity need a shelter will find it under its protecting influence. Besides, in a large section of the United States, the flower of the virile population had perished in the interstates war. A large portion of its dominant population will be disfranchised by the Third Section of the Article. In that region there had been a subversion of all the relations in society and a change in social order and condition; while in the other section there had been a great accumulation of capital and credit; shameful malfeasance had become very common and there had been an effusion over the whole land of an alert, active, aspiring, overreaching, unscrupulous class — the foulest offspring of the war — who sought money, place, and influence in the worst manner and for purposes entirely mischievous. Their associations were formed, not for such mutual advantage as is consistent with law, but for the execution of rapines that the laws prohibited. A wise and provident statesman would have found in the facts before him, and the fact that a vast development was taking place constantly leading to other and

perhaps greater mutations in society, an occasion for strenuous and patriotic exertion of his noblest powers."

Following a description of the character of the men dominating the Government of the State he said: "It would be too high and honorable a name to impute this act and many others of the same character to a result of ambition or usurpation, a love of power, or to introduce some broad, though erroneous, principle into the administration of the Government. We believe it to be a mere trade between the members of the Legislature and the corporation for the passage of the Act. The contents of the Act were matters of supreme indifference. . . . The value received by the members, not that to be obtained by the public, dictated the legislation and administration." [1]

Judge Campbell never applied to Congress to have removed the political disabilities imposed upon him by the Fourteenth Amendment, although assured that, upon his request, Congress would readily do so. He, therefore, took no other part in politics than as a citizen interested in the welfare of his State and country. In the contest for the electoral vote of Louisiana in 1876, William Pitt Kellogg sought to employ him, but he refused, saying: "I do not want your case. I do not want your money." He appeared with Judge Black and other eminent counsel in behalf of the State before the Electoral Commission. An extract from his argument is illustrative of his power to deal in strong language when,

[1] Lonn: *Reconstruction in Louisiana*, 42.

in his judgment, the cause justified him in doing so. Denouncing men who had seized the State Government and prostituted their power he said: "The Court must observe, from what I have already exhibited of the laws of the State, that the State is in possession of an oligarchy of unscrupulous, dishonest, corrupt, overreaching politicians and persons who employ the powers of the State for their own emolument. There is no responsibility on their part to any moral law or constitutional or legal obligations. For years they have usurped the powers of the State by means that have brought upon them the condemnation of the Senate of the United States, of the House of Representatives of the United States, and, I may say, of the whole people of the United States. These practices have been covered, immunity has been granted to them, because of their intercourse and connection with the polities and the parties of the Union; without that connection they would not stand in that State for a single hour. By their association they have prostituted every material and endangered every moral interest within the limits of the State." [1]

Judge Campbell did not engage in controversy regarding the results of the war nor the political conditions which prevailed in the South during the reconstruction period. Like many of the wisest Southern men he waited patiently for the passions of the day to pass away, trusting that the patriotic men of both sections would, with experience, come to a clearer view and a better state of mind. The only

[1] *Report of the Electoral Commission.*

expression of opinion upon the "negro question" which he appears to have given is found in an interview, while in Louisville, Kentucky, in which he is thus quoted: "As to the negro with the ballot in his hands, Judge Campbell expressed no resentment, nor feeling of reaction on the subject, but said it was truly a sore matter in the present condition of the South, because it rendered the efforts of what good men remained, abortive to restore solvency to the exchequer of the Southern States and to lead the general mind to the consideration of new issues. He intimated that in the States where the black vote was representative, nothing important in either Northern or Southern society had much chance to be brought to the court of public reason."

Among the incidents illustrative of his character, Major H. C. Semple tells of seeking to employ him in behalf of a friend who had been sued for a large amount on account of liability as stockholder in a bank, prior to the Civil War. The Circuit Court had decided the case against him. To Major Semple's request that, as Pollard, his client, was now a poor man, the Judge would accept a moderate retainer, he responded, "No, I will not. I do not accept moderate retainers. I cannot afford it; but I cannot afford to accept any retainer from Pollard, if he is poor. He attended upon me when I was married." He won the case.[1]

On February 22, 1824, the Executive Committee of the Alabama State Bar Association addressed to Judge Campbell an invitation to deliver the Annual

[1] Bailey *vs.* Pollard, 20 Wall. 520.

Address at its meeting on August 7 of that year. Following an expression of their appreciation of his accomplishments as a jurist, eminence as a citizen, and character as a man, the Committee concluded: "The Association feels a special pleasure in knowing that this choice is one on whom the esteem and affection of the people of Alabama have so long rested, that they have not ceased to claim him as one of their own." Acknowledging the receipt of the invitation, with expressions of grateful appreciation of the sentiment in which it was extended, he said: "I have been much affected by the terms of your letter and it is difficult for me to make the answer it merits from me. Fifty-four years ago to-day, I arrived at your city of Montgomery, at that date a village, upon the opening of the Spring Term of the Circuit Court. . . . The father of one of your Committee moved for my admission and I thus became a member of the Bar of Alabama."

Expressing doubt of his ability, by reason of his advanced age and physical condition, to appear in person, he promised, if able, to prepare an address and submit it to the Committee. This he did. The address is devoted to personal and professional reminiscences, an interesting historical review of events in Alabama during the half-century, and closed with an appeal to the members of the Bar to "stand fast in the liberty wherewith you became free, and which the Constitution has been the witness. Be constant and firm to insist that the State shall be maintained in the fullness of the powers reserved by the Constitution which was made by the people of

the States. The State is the repository where the family is formed, and with this, the source of domestic peace, where religion, morality, reverence, honor, human affections are implanted and instruction most purely imbibed. It is the State that most surely defends life, liberty, property, family obligations and rights; it is the State that teaches primary duties of manhood and which shields and protects womanhood in her purity and holiness."

In this, his last public word expressive of love for the State and admonition to her lawyers and citizens, he was consistent with what he had taught by precept and example — his devotion to the State and its place in the American political and social system. For the integrity of the rights of the State and in obedience to what he conceived his allegiance to her, he was ready to sacrifice place and position, to suffer misrepresentation and calumny to keep faith with his political integrity, although to his own hindrance.

On February 13, 1884, Mrs. Campbell died. One who knew husband and wife during the years of their married life said of them: "Talented, amiable, gracious, and good, she was a worthy helpmate of such a man. Domestic life is sacred, but it is no desecration to say of Judge Campbell that he was never too busy in his important duties to enjoy to the utmost the delights of family intercourse. Absorbed in important and laborious occupations, he seemed to the world cold and austere, but in his home life he made use of his wonderful learning, his excellent

taste, and his fine humor for the constant delight of his family and familiar friends. He was a most affectionate and loving husband, a most kind, prudent, and indulgent father." [1]

[1] Major H. C. Semple, in the Montgomery (Ala.) *Dispatch.*

CHAPTER XI

CONCLUSION

His home broken by the death of his wife, Judge Campbell in 1884 changed his residence, moving to Baltimore, Maryland, where two of his daughters resided, and where he spent the remaining years of his life. He did not seek or desire general practice, but realizing his ideal of a completed professional life, accepted retainers and argued in the Supreme Court of the United States such important causes as came to him. His last argument was made in the case of New Hampshire *vs.* Louisiana, into which he put the learning and reflection of a lifetime, winning not only added reputation, but establishing, as the unanimous opinion of the Court, a construction of the Constitution which protected the States from liability to suit without their consent, thus placing their credit upon the basis of their reserved political sovereignty and good faith. No man believed more strongly that it was the duty of States as well as citizens to discharge their obligations, but Judge Campbell well knew that the good-will between the several States so essential to their harmony and peace would have been endangered if the Court had sustained a State in becoming the collecting agency of the debts of other States. The prevention of this he regarded as the highest service which he had rendered to the States and a fitting conclusion of more than fifty years of professional life.

The men of his day have largely passed away; those who, either in association or in opposition, were his comrades at the Bar have, with but few exceptions, been gathered to their fathers. We have from one who occupied the relation of friend and pastor, a description of him during those years when interest in things pertaining to life was losing its hold and interest in those of eternal value was growing stronger. At the Memorial Meeting of the Bar of the Supreme Court, upon the suggestion of Senator Edmunds, Rev. Arthur Chilton Powell, the Rector of Grace Church, of which Judge Campbell was a communicant, was invited to speak. He said: "It was my privilege to know him in the latter days of his life, to enter somewhat into the fruition of his hopes and his plans, to see the culmination of his character, to observe the richness and the ripeness, the beauty and dignity of his sterling, honorable old age, and, I must say, and I take pleasure in saying it here to those of you who knew him, perchance, in his public career, in those stormy days when conflict and antagonisms prevailed, that of all men whom I ever saw, it seems to me that no one possessed in himself so much purity, so much conscientiousness, so much rectitude, and, at the same time, so much Christian simplicity, as did the honorable man whose memory we are here to commemorate. . . . In the province of his own home, perhaps no man was more conspicuous for those sterling and those common graces and gifts that mark our highest and our most characteristic National manhood. He was a man of strong domestic nature, a man of

pure and holy affection, a man whose life, notwithstanding its remarkable activity, seemed to find its joy and inspiration in the quietude and seclusion of his own home. It was, indeed, not only a pleasure, but a privilege, to enter that charmed circle where this rare old man, with his frosted head, with his genial manner, and with his mild grace, bade you welcome to enjoy that which he most loyally dispensed, the kindness and generosity and, at the same time, the tenderness of ripened manhood. . . . He was ashamed of nothing save perchance of wrong and dishonor, which never, even in his most public days, ever attached themselves to him, and whatever may have been his course regarding which there may have been diverse opinions, in his own conscience and before the bar of his own soul he pursued the straight and narrow path of high, dignified, and consecrated manhood." [1]

In 1889 an invitation was extended by the Court to Judge Campbell to attend the centennial celebration of the inauguration of the Federal Judiciary. When communicated to him by the Marshal during his last days, and while in his last illness, he responded: "Tell the Court that I join daily in the prayer, 'God save the United States and [its] honorable Court.'" These were his last words, addressed to the Supreme Court of the United States.

Judge Campbell died, March 12, 1889, at his residence in Baltimore, at the age of seventy-eight. The "Baltimore Sun," announcing his death, said: "He was a devout Christian, a diligent student of the

[1] *Memorial Addresses — Justice Campbell*, 16.

Bible and of theology, in which he had collected a large library. He was gentle in his character and domestic in his taste — devoted to his family."

Expressions of sympathy for his family and appreciation of the character and services of Judge Campbell came from Chief Justice Fuller and others in public and private station. The press of Baltimore, New Orleans, and Mobile contained appreciative tributes to his memory. At his funeral from Grace Church, Baltimore, Justice Lamar attended as the representative of the Supreme Court, and among the pallbearers were Senator James L. Pugh, of Alabama, Senator Randall L. Gibson, of Louisiana, Colonel Walter L. Bragg, of Alabama, and Major R. M. Venable, of Baltimore. Hon. William Pinkney Whyte and other members of the Bar, and representatives of all walks of life from Baltimore and other cities, did honor to the memory of the great lawyer and judge. The remains were deposited in the family lot in Greenmount Cemetery.

Judge Campbell's only son, Duncan Green Campbell, died several years prior to the death of his father. He left surviving four daughters, Mrs. Henrietta Lay, widow of Colonel George W. Lay; Mrs. Kate Groner, wife of Colonel V. D. Groner, of Norfolk, Virginia; Mrs. Clara Colston, wife of Captain Frederick M. Colston; and Miss Anna Campbell, of Baltimore.

At a meeting of the Bar of the Supreme Court, held on April 6, 1889, in Washington, Mr. George Ticknor Curtis was, upon motion of Mr. George F. Edmunds, called to the chair. Mr. William A.

Maury, in presenting resolutions, prepared by Mr. Augustus H. Garland, former Attorney-General, lamenting the passing away, within "the span of the same twelvemonth," of Chief Justice Waite, Justice Stanley Matthews, and John Archibald Campbell, said: "When such men are laid in the dust there comes a feeling of despair, for it is impossible that they should have left behind them one tithe of what their capabilities could have achieved. As Lord Coke says somewhere in his lamentation over the death of Littleton, a great and learned man is a long time in the making, and when he dies much learning dies with him."

Referring to his immense labor in acquiring the vast store of knowledge, in the civil and common law, he said: "It is well for the younger members of the profession to remember that the success of Judge Campbell at the Bar was the result of patient, laborious industry. He went to the bottom of everything that required his attention and shrank from no drudgery that was necessary to accomplish his purposes."

George F. Hoadly, referring to Judge Campbell's appointment to the Bench and the eventful incidents in his career, said: "Appointed to the Bench when only forty-one years of age, at the solicitation of the Judges of the Court, the most honorable method in which such an appointment could come, Judge Campbell lived twenty-eight years beyond the date of his resignation, lived to see his country reunited and the great Nation in whose jurisprudence he took such patriotic pride, rejuvenated and

renewed. Notwithstanding the years passed in the uncongenial service of Assistant Secretary of War of the Confederate States, his later life was not sorrowful in contemplation of the fact that the hopes of his warlike career, if such it may be called, had been frustrated, and that all portions of the country were again united under the ancient banner which he once represented as a member of the Court."

Judge Hoadly's estimate of Judge Campbell's equipment for and service on the Bench is of special value because of his professional learning and experience. He said: "He combined, in an unusual degree, the knowledge of the Roman law and the common law. Familiar with the laws of Louisiana and Texas and the civil law system, which is the foundation of their jurisprudence, he knew, as well, the common law which prevails in the other States. How well he performed his duties, how fully he fulfilled the expectation of the members of the Court who solicited his appointment, I need not say. Nearly thirty years have passed since he wrote his last opinion in this Court, but we all know him, as history has recorded him, as a grave, serious, careful, clear, logical, persuasive, expounder of the law."

William H. Evarts bore generous testimony to Judge Campbell's character and judicial service, saying: "His repute had long been established with the Southern Bar very clearly as that of an eminent lawyer in the sense of judicial power and of philosophical and constitutional accuracy and strength. After taking his seat here he commended himself to the Northern Bar and to all the forensic disputants

before this Court. I think the Bar, therefore, felt it with a sensible regret and as a withdrawal of strength from this Court, when he was no longer counted among its Judges. If that opinion was entertained at that time, I am quite sure I am right in saying that, in the observation by the profession and by the public of Mr. Campbell's career, as a member of the Bar, on his return to practice in this Court, they felt even an increased regret that his great powers and his supreme integrity of nature and intellect had been permanently lost to the Bench."

George Ticknor Curtis knew and practiced at the Bar of the Supreme Court while Judge Campbell was one of its members. He also knew, better than any other living man, the estimate in which he was held by his brother Judge Benjamin R. Curtis. His remarks upon specific cases and other phases of the work of the Court, and Judge Campbell's relation to them, have been quoted. Concluding his interesting address, he said: "At the close of the Civil War, Judge Campbell resumed the practice of his profession and he has been a very conspicuous figure at this Bar for many years. He ranks with the greatest advocates of our time, not for eloquence, not for brilliancy, not for the arts of the rhetorician, but for those solid accomplishments, for that lucid and weighty argumentation, by which a Court is instructed and aided to a right conclusion. The day of mere eloquence has passed away from this forum. What is effectual here now is clearness of statement, closeness and accuracy of reasoning, and the power

to make learning useful in the attainment of judicial truth. These accomplishments were possessed by Judge Campbell in a very uncommon degree. He has lived to a great age, and in the whole of his long life there has never been a public act or utterance that is to be regretted."

These tributes were from the most eminent statesmen and lawyers of their generation, none of whom, except Mr. Maury, were from the section of the country in which Judge Campbell was born and spent his life; nor were they in sympathy with his political opinions; they had lived through and acted their part in no mean places in the stirring events in which he figured in opposition. They fix the place which he held in their estimate as a lawyer, judge, and citizen. The resolutions, attesting their "admiration and appreciation" of his "great career as a leading practicing lawyer, and as a judge of the first rank," and "in commemoration of his many public and private virtues and that modesty and simplicity which were the chaste setting of his great intellect and learning," were unanimously adopted and presented to the Court by the Attorney-General, with appropriate remarks. In accepting them and directing that they be spread upon the record, Chief Justice Fuller said: "The Court recognizes in the decease of Mr. Justice Campbell the departure of an eminent citizen, who through his power of intellect, profound learning, and unremitting diligence, coupled with integrity of mind and sincere love of justice, deservedly achieved high reputation as a jurist and reflected corresponding credit upon this Bench

during the years he adorned it. His accession here had been preceded, as his regretted retirement was followed, by distinguished service in the legal profession."

Thus is the record of his life and work as a member of the Bar and of the Court, in this tribunal of National jurisprudence, made and perpetuated for all time.

In the State and Federal Courts of New Orleans no less generous tributes were paid to Judge Campbell. Resolutions were drawn and presented by E. T. Merrick, Thomas L. Bayne, Carleton Hunt, Edgar H. Farrah, and other eminent members of the Bar, expressive of their appreciation of his character, learning, and services. Hon. Thomas J. Semmes, in presenting them to the Circuit Court of the United States, delivered an address justly described as "of classic precision and eloquent diction," reviewing the history of Judge Campbell from his birth to the end of his career.

Mr. Charles Parlange, District Attorney, in moving acceptance of the resolutions by the Court, thus concluded his eloquent tribute: "As long as the judicial records of this country shall be preserved, as long as the tradition of eminent deeds by eminent Americans shall be handed down, as long as the annals of the greatness of America shall be perpetuated, so long shall the name and fame of John Archibald Campbell endure."

Mr. Thomas L. Bayne in a singularly happy description of Judge Campbell, referring to his social and domestic relations, said: "Here he was as ten-

der and gentle and affectionate as a woman. He neither knew nor saw any wrong in those whom he loved, and in return those who were nearest to him loved him past all understanding. In early life he had promised his mother that he would, each day of his life, read a chapter in the Bible; this he fulfilled. I remember to have seen on his table the Bible used by him, with a regular memorandum made therein of the number of times he had read it. He was as familiar with the Old and New Testament as he was with the alphabet. Commenting upon one of the new books upon what is denominated 'modern Christianity,' he pointed to his large library of books on religious subjects and said: 'I have read all of these, but after all, I return to the teachings of Jesus Christ as given in the New Testament and as practiced by the plain and honest people, with whom I passed the earlier years of my life.'"

Mr. Bayne closed his remarks, as follows: "Great lawyer, wise judge, earnest patriot, able statesman, affectionate friend, devoted father, Christian gentleman. We shall not soon look upon his like again."

Speaking for the Court, Judge Billings, following a tribute to his learning, industry, and service on the Bench, said: "At better advantage, perhaps, than at any other period of his life did he show his indomitable character and the splendor of his talents when, at the close of the war, at the age of fifty-five years, houseless and penniless, without occupation — all aids to and even connection with it destroyed — he addressed himself to building up anew a professional business. Like the fabled phœnix, he rose

from his ashes, and on such pinions that the flight of his declining years was higher than that of his early manhood. By his natural gifts and his toil, as if he had been two distinct beings, he twice achieved fame and success at the Bar, which would have satisfied the most ambitious man on either continent: the last time when he was no longer sustained and borne on by the tireless, adventurous spirit of a boy, but was compelled to rely upon the heroic purposes within him, so strong that they could not be chilled by disappointment nor chilled by age. . . . He was as tender as he was true, and no one whom he loved ever approached him in anxiety or sorrow without losing something of his personal suffering in being made to feel how consistent with gentlest kindness was true greatness and how little foundation there was for the creed of small men that to be gifted in intellect one must be hard in feeling."

These tributes by men with whom for the last twenty-five years of his life he was in close association justify the words in which they describe his career: "His record is clear, his success is a triumph. His ambition in life was not in the line of political preferment, but rather to be known as a great and successful lawyer — to do good things and to achieve great things. He loved the profession of the law. He pursued his plan with constancy and with concentration of purpose rarely exhibited. His intellect was massive, his learning profound, his instinct judicial, his judgment sound. With his massive and solid intellect he combined the weight and force of an irreproachable character. With a femi-

nine sense of propriety he was tender to the unfortunate, charitable to the afflicted, gentle to the weak. In the courts and tribunals his influence was vast. Upon the Bench his administration of justice was prompt, pure, and luminous."

It is a source of regret that, like so many Southern men during the last century, Judge Campbell did not preserve his correspondence. He left no letters received, nor copies of those written by him, other than those referred to in the foregoing pages, nor did he keep a diary or journal. Except for his service during two sessions in the Legislature of Alabama, during the early years of his life, he neither sought nor accepted political office. As said by him in his letter to the Committee of the State Bar Association, prior to his appointment to the Bench, he practiced his profession without "relaxation or diversion." In the same letter he wrote: "I have paused to recollect the names which were once so familiar and so endeared by familiar and friendly connection. I find that the Judges of the Supreme and Circuit Courts, the Chancellor, the members of the Bar at Montgomery and the Supreme Court, during my attendance upon the Courts, no longer remain. The one event that happeneth to all hath happened to them alike, but I should regret to think the memory of them is forgotten." He pays generous tribute to those with whom he was associated, and "informs" those who have come after them of the debt "owed to those who established the dominion of law and the course of legal procedure in Alabama."

His duties on the Bench removed him from social

and professional association with those among whom he had spent the first twenty years of his professional life. As we have seen, he was not in sympathy with the political leaders of the State during the years immediately preceding the Civil War, and at its close found his field for labor in another State. His professional labors during his residence in New Orleans gave him but little time for recreation or for reëstablishing the relations severed by the war and its results. That he retained the esteem and friendship of the descendants of the friends of his young manhood is seen in the assurance by the Committee representing the State Bar Association, when he had reached the age of seventy-three years, that he was "one on whom the esteem and affection of the people of Alabama have so long rested, that they have not ceased to claim him as their own." After his death a life-size oil portrait of Judge Campbell was presented to the Circuit Court at Montgomery with a generous tribute, by Major H. C. Semple, who "had known him for forty years and ever esteemed it an honor that he had enjoyed his intimate friendship."

An estimate of Judge Campbell's judicial labors must be based upon a study of his opinions and the judgment of his associates, and of the Bar practicing before the Court. An effort has been made, by liberal quotations from his opinions, to afford an opportunity to those interested in his career to form such an estimate. That Judge Campbell was, "as history has recorded him, a grave, serious, careful, clear, logical, persuasive expounder of the law, and

as such his fame will go down to generations in the judgment of the great lawyers with whom he was associated," and that, "coupled with integrity of mind and sincere love of justice, he deservedly achieved high reputation as a jurist and reflected corresponding credit upon the Bench during the years he adorned it," was declared by Chief Justice Fuller, who presided at the meeting of the Bar of the Supreme Court of the United States April 6, 1889, on the occasion of the death of Judge Campbell.

While many, probably a majority, of the opinions in which Judge Campbell dissented from the majority of the Court, extending and enlarging the jurisdiction of the Federal Courts, have not prevailed, he was in agreement with a school of statesmen and jurists, eminent for learning and wisdom, who believed that it was by a strict construction of the grants of power in the Federal Government that not only the reserved rights of the States, but the civil and political liberty of the citizen were best protected. The opposite view prevailed, for reasons which enter into the history of the Republic during the latter years of the nineteenth century, and is now held not only by Northern, but as strongly by many Southern statesmen and jurists. If there be any counter-current of thought at this day, it is to be found in New England rather than in the South. Some years since one of the most scholarly and accomplished citizens of Massachusetts, a descendant of the second and sixth Presidents, referring to an expression used by a Southern man in a public address, said: "I see that you term State sovereignty

an 'overly debated question.' In this I cannot quite concur. On the contrary, I think it is somewhat incumbent now upon all persons who have occasion to refer to that subject to throw great emphasis on the original organization of the United States, including State sovereignty. The tendency now is to the other extreme. The centrifugal action has worn itself out, and the centripetal action is now making itself felt, and that to an inordinate degree." Referring to a then recent decision of the Supreme Court he wrote: "It goes a long way in the direction of conceding to the National Government all powers not expressly inhibited, thus exactly reversing the original rule."

Judge Campbell contended for the preservation of the ancient landmark, and who may say that in the future those who seek to restrain the exercise of centralized power will not find support in the vigorous thought and language of his dissenting opinions?

His efforts on the three occasions referred to, to stay the current of political and sectional passions, and either prevent civil war or to bring it to an end, are, for the first time, told in the "record" made by himself at the time. On each occasion, either from ignorance of the facts or for political reasons, both have been misrepresented and misconstrued. It is not the purpose of this work to invite controversy regarding the motives of those with whom he was associated, but to permit Judge Campbell to tell the story in his own way. Whether Judge Nelson, Judge Campbell, and Mr. Seward were correct in thinking that, by surrendering Fort Sumter in April, 1861, the secession of the border States would be pre-

vented and the return of the seceding States to the Union secured, is of necessity conjectural. It is probable that the conflict was irrepressible and that only by civil war could slavery, the cause and occasion of the controversy, be destroyed.

Judge Campbell's connection with the Hampton Roads Conference has been told by himself and calls for no further discussion. It is manifest that he did not anticipate any practical result from it, unless Mr. Davis was willing to enter upon negotiations resulting in a return, by the seceding States, to the Union, and this was, from his point of view, impossible. As said by Mr. Hunter, there was much to be said on both sides of the question. Wars are seldom brought to an end until the weaker belligerent acknowledges defeat. It is probably true that inconclusive war seldom brings permanent peace. It was difficult for a man of Judge Campbell's judicial temperament to recognize the necessity for the Southern people to be subjected to the fate which he saw awaited them. Whether Mr. Davis or Judge Campbell saw more clearly what was the better course to pursue on February 5, 1865, admits of much debate. Mr. Davis regarded Mr. Lincoln's terms as a demand for an "unconditional surrender," and this he could not consider. Judge Campbell regarded them as a basis for further negotiation, resulting in restoration of the Southern States to the Union. The difference was irreconcilable, and nothing remained to be done but await the result, which both did, and pursued with constancy and courage the course which their

sense of duty dictated. The two men were temperamentally different, and while they were not in agreement in regard to the course which should be adopted at the beginning or as the end of the struggle approached, there is no evidence that either questioned the patriotism of the other.

After the fall of Richmond and the surrender of General Lee, both Mr. Lincoln and Judge Campbell sincerely desired to save the people of the South from the fate which threatened them. That the plan proposed by Mr. Lincoln and concurred in by Judge Campbell, if successful, would have brought earlier restoration of the seceding States, and would have saved the country from the dark days of Congressional reconstruction, is now conceded by all thoughtful men. The record made by Judge Campbell of the conversations with Mr. Lincoln and the course pursued by himself vindicates, not only the purity of his motive, but the wisdom of the counsel which he gave and the action which he took. But for the interference of the radical members of the Cabinet and the Senate, rendered successful by the assassination of the President, a different and brighter chapter in our history of those years would have been written; but, as said by Mr. Curtis: "We can rejoice that from the turmoil and hazards of that trying period, thanks be to God, the Constitution of the United States has come out of all its perils in a far better condition than could have been anticipated for it. It is no longer a subject of sectional controversy." Of Judge Campbell he said: "He has lived to a great age, and in the whole of his long life

there has never been a public act or utterance that is to be regretted."

Whatever men of opposing opinions in respect to the wisdom of Judge Campbell's course on these three occasions may think, none will doubt the truth of the record made by him and set out in the foregoing pages, nor deny that he was prompted by patriotic motives and a desire to serve not only the Southern people, but to promote the welfare of the entire country. As he wrote at the time of making the record: "It contains the 'Facts of History.'" In regard to his motive repelling the charge made by Speed and other enemies, he wrote: "It was for the people I made intercession. I counseled the conquerors to use magnanimity, forbearance, kindness for his own honor and advantage, not especially for mine. I asked no boon for myself. . . . I have a right to be exempt from all unjust censure and from all misrepresentation of my connection with these events and from all unjust accusation."

The truth of these words and the justice of this demand are manifest. That both would have been admitted and secured by Mr. Lincoln if he had lived, none can doubt. Mr. Evarts truly said, when Judge Campbell had passed away: "There is no danger that Mr. Campbell's public relations to the country at large, which the Civil War produced, will affect the judgment of our profession, and through them the people of the whole country, in their esteem of the value of his great services and of those traits of character and lines of conduct that entitle him to be permanently remembered."

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The Riverside Press
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